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In the Supreme Court of the United States

No. 474 October Term, 1963

PAUL LAMONGE,

Petitioner

vs.

THE STATE OF OHIO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Petitioner was deprived of his rights under Article 1, Section 5, of the Constitution of the State of Ohio, and the 6th Amendment of the Constitution of the United States for the reason that the panel of jurors drawn to serve as grand jurors was not selected according to law and was in violation of the guarantee given to him under the 14th Amendment of the Constitution of the United States.

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The right to a public trial was violated wherein a jury was removed to the home of a witness and admittance into the home of said witness was refused to the public and to the press. A right to trial by an impartial jury was also violated wherein the witness was not within view nor hearing range of the jury, all of which is in violation of the due process of law under the fourteenth amendment of the United States Constitution.

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Due process of law under the 14th Amendment was violated in permitting the prosecuting attorney of the objection of the petitioner to cross-examine said petitioner as to matters completely collateral and not associated in any way with the crimes charged in the amended indictment and in failing to instruct the jury as to the reason for permitting the latitude given to the prosecuting attorney in this examination.

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Due process of law under the 14th amendment requires a resubmission of the case to the grand jury after the indictment was amended by the prosecuting attorney by and through permission granted by the trial court wherein the indictment was amended by changing Count 3 therein to read: "In conspiracy with Frank Cickelli, did unlawfully obtain possession of certain property of Al Cicchini, Rocco Ferrera, and Eugene Brady, etc." The original indictment in Count 3 charged the defendant as a principal only.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. October Term, 1963

PAUL LAMONGE,
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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable, Earl Warren, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

PAUL LAMONGE, Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the above cause on June 19, 1963, affirming the judgment of the Court of Appeals of the Fourth Judicial District of the State of Ohio sitting by assignment in the Seventh Judicial District of the State of Ohio, convicting him of one count of threatening to kill with intent thereby to extort money and one count of conspiracy with another to unlawfully obtain money induced by false representation.

(1) The record was not printed in the Court below and motion is fully filed in this Court to dispense with the printing of the record on Petition for Certiorari. This motion is printed as an addendum to this Petition and Brief. References to the original record bear the designation "R."

OPINIONS BELOW

The trial court, the Court of Common Pleas of Trumbull County, Ohio, issued no opinion in this case. The opinion of the Court of Appeals for the Fourth Judicial District sitting by special assignment in the Seventh Judicial District of Ohio, has not been reported. The decision, without opinion of the Court below, the Supreme Court of the State of Ohio in affirming the judgment of conviction and in denying defendant's (A) appeal as of right, and (B) motion for leave to appeal, has not been reported.

JURISDICTION

This cause was argued before the Supreme Court of Ohio on May 10, 1963. The opinion and judgment of that Court was entered on May 15, 1963. On that date, the Ohio Supreme Court denied defendant's appeal as of right on the ground that no debatable constitutional questions were involved. On May 28, 1963, an application of rehearing was filed by the Defendant in the Supreme Court of Ohio. On June 19, 1963, the Ohio Supreme Court denied a rehearing on said application, continued the bond of the Defendant, and stayed the issuance of the entry and mandate pending defendant's filing his Petition for a Writ of Certiorari to the Supreme Court of the United States.

The jurisdiction of this Court is marked under Title 28, Section 1257, of the Judicial Code. (See also Part V, Rule 19, of the Revised Rules of the Supreme Court of the United States.)

The questions herein presented were raised in the trial court, in the Court of Appeals and in the Supreme Court of Ohio.

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTER INVOLVED

A secret indictment was issued by the September Term 1961 of the Trumbull County Grand Jury, charging the Defendant-Appellant with four separate and distinct crimes, to-wit: Count One—threatening to kill Eugene Brady with intent thereby to extort money, namely $200,000.00, contrary to Section 2901.32 of the Revised Code of Ohio; (A-4), Count Two—threatening to kill Al Cicchini with intent thereby to extort money, namely $200,000.00, contrary to Section 2901.32 of the Revised Code of Ohio; (A-4), Count Three—in conspiracy with Frank Cickelli did unlawfully obtain possession of certain property of Al Cicchini, Rocco Ferrera and Eugene Brady, to-wit: $10,000.00 with their consent induced by false representations, to-wit; that he and Frank Cickelli represented Mayor Walter Pestrak, contrary to Section 2907.21 of the Ohio Revised Code; (A-5), Count Four—did corruptly attempt to influence Rocco Ferrera in the discharge of his duties as a witness who was to appear before the September Term of the Trumbull County Grand Jury, contrary to Section 2917.07 of the Ohio Revised Code. (A-5)

The original secret indictment is dated October 2, 1961, to which the Defendant-Appellant filed a demurrer. Before the Court ruled on said demurrer, the Prosecuting Attorney of Trumbull County, Ohio, Lynn B. Griffith, Jr., reconvened the September Term of the Trumbull County Grand Jury for the purpose of correcting certain obvious defects in the first draft of the secret indictment aforesaid, and on October 13, 1961, Defendant-Appellant was then re-indicted with the same crimes as stated herein. To said indictment, the Defendant-Appellant entered his plea of not guilty with the record reservation and with the approval of the Court, that he reserved the right to move or demurrer to said indictment.

Subsequently thereto, on January 30, 1962, Defendant-Appellant filed a motion moving the Court for an order changing the place of trial to an adjoining county, which the trial court overruled. On the same day, Defendant-Appellant filed a motion moving the Court to dismiss the indictment against him for the reason that the Grand Jury of the September Term, 1961, of the Trumbull County Common Pleas Court was illegally and unlawfully selected, which the Court overruled.

On January 30, 1962, five days before this case was called for trial, the trial Court permitted the Prosecuting Attorney, Lynn B. Griffith, Jr., to amend the aforesaid indictment by changing Count Three therein to read: "in conspiracy with Frank Cickelli, did unlawfully obtain possession of certain property of Al Cicchini, Rocco Ferrera and Eugene Brady, etc." The original indictment in Count Three charged the Defendant-Appellant as a principal only. This change was duly objected to by the Defendant-Appellant, which the Court overruled.

Jury trial was had in this matter in the Common Pleas Court of Trumbull County, beginning February 5, 1962, the Honorable G. H. Birrell presiding.

Before the trial began, Defendant-Appellant made various oral Motions to the Court, amongst which included a Motion to dismiss the indictment for the reason that the Grand Jury of the September term, 1961, of the Trumbull County Common Pleas Court was illegally and unlawfully selected, which the Court overruled.

Evidence was presented by both the Prosecution and the Defense; after the State of Ohio rested their case the Defendant-Appellant orally moved that each and every Count of the indictment be dismissed, and the Court sustained Defendant-Appellant's motion dismissing Count Four of the indictment, for the reason that the State of Ohio has failed to prove venue. The cause was then sub-

mitted to the jury, after being charged by the Court on February 10, 1962, at 11:00 A. M.

At 11:13 P. M. on Saturday, February 10, 1962, the jury advised the Court that they had been unable to reach a verdict, and the Court then instructed the jury to be retired to the Warner Hotel, Warren, Ohio, for the night.

On Sunday, February 11, 1962, at 9:00 A. M., the jury returned from the Hotel and again began their deliberations. At 11:16 A.M. on February 11, 1962, the jury returned with a verdict of guilty in the manner and form as the Defendant-Appellant was charged in Count One and Count Three of the indictment, and not guilty in the manner and form of Count Two of the indictment.

Thereafter, on February 16, 1962, Defendant-Appellant was sentenced by Judge Birrell to be imprisoned and confined in the Ohio State Penitentiary and kept at hard labor for not less than five nor more than thirty years on Count One. Defendant-Appellant was further to be imprisoned in the Ohio State Penitentiary for not less than one nor more than seven years on Count Three; that said sentence of the Court shall be served consecutively and that the Defendant pay the costs of prosecution.

Motion for a new trial was filed on February 14, 1962.

This Motion was overruled by the Court on the date of sentencing, to-wit: February 16, 1962, and notice of appeal from the judgment and sentence of the Court entered in this matter on February 16, 1962, and from the judgment of the Court and overruling Defendant's request for a new trial was filed by the Defendant.

This appeal having been perfected by the Appellant, Paul Lamonge, and a bill of exceptions consisting of the entire trial proceedings below having been filed within due time, the matter was retained by Fourth District Court of Appeals sitting by assignment in the Seventh

District as an appeal on questions of Law. Said Court affirmed the judgment and sentence of the Trial Court by opinion dated November 7, 1962, and written by the Honorable William D. Radcliff, presiding Judge and same was journalized by said Court on December 3, 1962.

An appeal to the Supreme Court of Ohio from the affirmance by the Court of Appeals on said conviction, judgment and sentence was taken under the provisions of the Revised Code of Ohio, Section 2505.28. This appeal was filed both as a matter of right, since debatable constitutional questions were involved, and on condition that motion for leave to appeal be granted by the Supreme Court. The Supreme Court on May 15, 1963, dismissed and denied both requests, stating as to the appeal filed as of right, that no debatable constitutional questions were involved. A final judgment was rendered by the Ohio Supreme Court on June 19, 1963, when it denied petitioner's application for rehearing. This judgment constitutes a final judgment by the highest court of that State. (Tumey vs. State of Ohio, 273 U. S. 510, 515; Hetrick vs. Lindsey (Ohio) 265 U. S. 384.)

STATEMENT OF FACTS

As appears from the record, the facts of the case are very complex. This case arose out of an investigation by the Prosecuting Attorney of Trumbull County, Ohio, with reference to solicitation by certain councilmen of the City of Warren, Ohio, and the Ferrera Boam Company of Livonia, Michigan.

It follows that the City of Warren advertised for bids for the construction of the Warren Sewerage Project and after the third advertisement, the Ferrera Boam Company was successful in obtaining the contract for the construction of said project.

However, during the course of submitting the bids, the Ferrera Boam Company met three of the councilmen of the City of Warren and the Democratic chairman of Trumbull County and the purpose of their meetings was to negotiate a possible payoff to the councilmen by soliciting their vote in the appropriation of the money for said project.

The record indicates that an agreement was reached at one of the meetings whereby the Ferrera Boam Company was to pay to one of the councilmen the sum of $35,000.00. The Defendant up to this point was not involved in these negotiations. He first appeared on the scene after the contract had been awarded and the money appropriated and he was employed by the construction company to supply trucks to be used on said project.

The record then indicated that from that date on, the facts are in dispute. The prosecution witnesses claiming that he was placed on the job by the Democratic chairman and the chairman advised them to do what the Petitioner told them to do and that any monies to be paid were to be paid to him. The Defense witnesses testified that there was no such agreement by the Petitioner and

the Democratic chairman and that he was employed by the construction company and that at one time he was paid the sum of $5,000.00 for services rendered to the company and that he was also given a package consisting of $5,000.00 which was to be used to influence the Board of Control of the City of Warren, Ohio, to make certain specification changes so that the construction company could make a larger profit.

On August 29, 1961, a verbal argument occurred between Eugene Brady of the construction company and your Petitioner and that during the course of the argument the prosecution witnesses stated that the Petitioner threatened to kill Eugene Brady and Al Cicchini of the construction company and attempted to extort from them the sum of $200,000.00. The defense witnesses testified that this was not the case; that the Petitioner argued with them about the way in which they were treating a subcontractor, The Al Monzo Construction Company, of Monroeville, Pennsylvania.

Subsequent thereto, the construction company stopped work on the project and it was at this point that the Prosecuting Attorney of Trumbull County, Ohio, began his investigation and your Petitioner was subsequently indicted as stated aforesaid.

The record clearly indicates that the trial of this cause was marked with many unusual occurrences, some of which have been noted in the reasons for allowances of this writ and in the specifications of errors hereinafter stated, others of which consisted of threatening the jurors which required the dismissal of two of the jurors during the course of the trial and replacing them with two alternates.

QUESTIONS PRESENTED

(1) Whether the petitioner was deprived of his rights under the 14th and 6th Amendments of the Constitution of the United States of America for the reason that the panel of jurors drawn to serve as grand jurors was not selected according to law.

(2) Whether the taking of the jury to the home of a state witness over the objection of the petitioner is consistent with the due process law guaranteed by the 14th Amendment of the Constitution of the United States and the 6th Amendment of the Constitution of the United States, when it appeared that the jury was seated in a room and could not see the witness and the trial judge and reporter were in a hallway and the witness was lying in bed with a towel over his face.

(3) Whether the jury was influenced and prejudiced towards the petitioner when the trial court permitted the prosecuting attorney to cross examine the petitioner as to matters completely collateral and not associated in any way with the crimes charged which deprived the petitioner of his rights under the 6th and 14th Amendments of the Constitution of the United States.

(4) Whether the petitioner, deprived of his rights under the Fifth Amendment of the Constitution of the United States of America for the reason that the indictment under which this petitioner was tried was amended without referring same back to the Grand Jury according to law, was denied the protection of due process under the 14th Amendment of the Constitution of the United States.

REASONS FOR ALLOWANCE OF WRIT

(1) The failure of the trial court to quash the secret indictment rendered by a grand jury that was not selected according to the mandatory requirements of Ohio Revised Code, Sections 2313.06, 2313.08, 2313.10, 2313.12, 2313.13 and 2313.15. This being a denial to the petitioner, the due process clause guaranteed him by the 14th Amendment of the Constitution of the United States.

(2) The taking of the court and jury to the home of a sick witness over the objection of the petitioner where the jury was unable to see the witness and to observe his demeanor and the manner in which he gave his testimony and to judge his credibility and where the public was not permitted to see this part of the trial, denied to the petitioner the rights guaranteed to him under the 6th Amendment of the Constitution of the United States and the due process guarantee under the 14th Amendment of the Constitution of the United States.

(3) The trial court errored in permitting the prosecuting attorney over the objection of the petitioner to cross-examine him as to matters completely collateral and not associated in any way with the crimes charged in the amended indictment and in failing to instruct the jury as to his reason for permitting the latitude given to the prosecuting attorney in this examination. Admission of this type of evidence is universally considered improper and highly prejudicial and denies to the petitioner the guarantee given to him of having a fair and impartial trial before a jury as guaranteed by the due process clause of the 14th Amendment of the Constitution of the United States.

(4) The failure of the trial court to resubmit the case to the grand jury after the indictment, under which this petitioner was tried, was amended by the prosecuting attorney by and through permission granted by the trial court.

(5) The precise Federal questions of substance herein raised have not been heretofore determined by this court. These are important questions of Federal law which should be settled by this Court. The questions can to the very essence of a criminal trial and the resolution thereof will virtually effect the administration of justice in criminal cases throughout the nation.

PRAYER FOR WRIT OF CERTIORARI

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Supreme Court of the State of Ohio to the end that the constitutional questions and issues herein involved may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Ohio be reversed by this Court and for such further relief as to this Court may seem meet and proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals for the Fourth Judicial District sitting in special assignment in the Seventh Judicial District of the State of Ohio has not been reported.

The decision without opinion of the Supreme Court of the State of Ohio has not been reported.

II. JURISDICTION

(1) The date of the final judgment to be reviewed is June 19, 1963.

(2) The statutory provision which is envoked to sustain the jurisdiction of the court is Title 28, Section 1257, of the Judicial Code, and Rule 19 of the Revised Rules of the Supreme Court of the United States.

(3) a. The Constitutional questions as to the improper selection of the grand jury rendering the secret indictments.

(3) b. The taking of the jury to the home of a state witness over the objection of the Defendant and permitting the prosecuting attorney to cross-examine the petitioner as to collateral matters not associated with the crimes charged, were all raised at the trial and before the Court of Appeals and the Supreme Court of the State of Ohio as involving violation of petitioners rights under the Federal constitution 6th and 14th Amendments. As will be shown by the docket entries and original papers which will be transferred to you by the clerk of the Supreme Court of Ohio.

(4) The petition is for review of a cause wherein final judgment has been rendered or passed upon by the highest court of a state in which a decision could be had, in which petitioner specifically set up and claimed a right under the Constitution of the United States.

III. STATEMENT OF THE CASE

This has already been stated in the preceding petition (pages 4-9), which is hereby adopted and made a part of this Brief.

IV. SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of the State of Ohio erred:

(1) In denying your petitioners appeal as of right on the ground that no debatable Federal constitutional questions were involved.

(2) In failing to hold that the grand jury, which rendered the secret indictment against the petitioner, was not properly selected, which denied the petitioner the rights guaranteed to him under the 6th and 14th Amendments of the Constitution of the United States of America.

(3) In failing to hold that the trial court errored in taking the court and jury to the home of a state witness over the objection of the Defendant, where the jury could not see the witness which deprived the petitioner of the rights guaranteed to him under the 14th Amendment of the Constitution of the United States and the right of a public trial guaranteed to him by the 6th Amendment of the Constitution of the United States.

(4) In failing to hold that the trial court committed highly prejudicial error by permitting the prosecuting attorney to cross-examine the petitioner as to matters completely collateral and not associated in any way with the crimes charged in the amended indictment and by failing to instruct the jury the reason for permitting the prosecuting attorney to cross-examine the petitioner as to these matters which deprived the petitioner of his privilege of the 14th Amendment to the United States Constitution to have a fair and impartial trial before a jury that was not prejudiced by this evidence.

(5) In failing to hold that the trial court errored in failing to resubmit the case to the grand jury after the indictment, under which the petitioner was tried, was amended by the prosecuting attorney by and through permission granted by the trial court.

(6) In affirming the judgment of the Court of Appeals for the Fourth Judicial District sitting in special assignment in the Seventh Judicial District of Ohio.

V. ARGUMENT

Point I

Petitioner was deprived of his rights under Article 1, Section 5, of the Constitution of the State of Ohio, and the 6th Amendment of the Constitution of the United States for the reason that the panel of jurors drawn to serve as grand jurors was not selected according to law and was in violation of the guarantee given to him under the 14th Amendment of the Constitution of the United States.

The indictment in this case was returned by the grand jury of Trumbull County, Ohio, for the September term, 1961. It is important to remember that this was the Grand Jury for the September, 1961 term because the same judge who overruled this petitioner's motion to dismiss the indictment had previously sustained a challenge to a petit jury array in the trial of another defendant, Raymond Little, who was also indicted at the same time. And that petit jury to which the challenge was sustained was for the September, 1961 term and was selected at the same time and in the same manner as the grand jury which indicted Paul Lamonge, the petitioner herein.

It is also important to remember that the indictments against your petitioner were secret indictments. The first one was returned on October 2, 1961, to which your petitioner filed a demurrer, but before the Court ruled on said demurrer, the prosecuting attorney reconvened the grand jury and on October 13, 1961, another indictment was returned to which the petitioner was required to plead on October 17, 1961. At that time he entered a plea of not guilty but was given leave of Court to file motions to the indictment by October 20, 1961. Thereafter on January 30, 1962, the indictment of October 13, 1961, was amended and the third count of the indictment changed the crime charged from that of a principal to that of a conspirator. The petitioner was never arraigned on this amended indictment and to this day, no plea has ever been entered to this amended indictment.

However, on the same day, January 30, 1963, the petitioner filed a motion to dismiss the indictment against him for the reason that the grand jury of the September, 1961 term was illegally and unlawfully selected.

The memo attached thereto referred the Court to its own ruling on the motion challenging the array of the September, 1961 petit jury in the case of **State of Ohio vs. Little (Case No. 11628,** Trumbull County Court of Common Pleas) which it had sustained on November 8, 1961.

Each of the irregularities on which that motion was sustained went to a failure of either the Board of Elections or the Jury Commissioners to follow the mandatory provisions of the Ohio Statutes dealing with the drawing of jurors as hereinafter set forth.

2313.06 Poll Lists. (GC s 11419-8)

On or before the last day of December, in each odd-numbered year, unless otherwise ordered by the court of common pleas, the board of elections for each county shall make and file with the commissioners of jurors a certified list containing the names and addresses of all the electors of the county shown on either the pollbooks or registration lists for the next preceding general election.

2313.08 Annual jury list. (GC s 11419-41, 11419-9)

The jury year in each county shall begin on the first Monday of August of each year, provided the court of common pleas may designate otherwise. A new and complete jury list shall be made up annually by the commissioners of jurors and shall be certified by them and filed in their office before the beginning of each jury year. The said names shall be entered in a suitable book or record, to be known as the "annual jury list," and shall be arranged alphabetically so far as practicable and under convenient divisions by precincts, districts, and townships, and shall be properly indexed. With each name

shall be recorded the occupation, place of business, and place of residence, as nearly as the same can be ascertained. A duplicate of said annual jury list shall be certified by the commissioners and filed in the office of the clerk of the court of common pleas, and the commissioners may, by order of the court, add to said list, or enter on a supplementary list, the names of persons, their occupations, place of business, and place or residence, who shall thereafter be discovered to be qualified to serve as jurors.

In the selection of the names for said compiled list, unless otherwise ordered by the court, the commissioners shall proceed to assign a consecutive number to each name upon said list of electors, starting with one, and shall use, for the purpose of compiling said list of prospective jurors, a key number which shall be designated by the court. Said commissioners shall proceed to select from said list of electors the name of each person accordingly as the key number so designated, or the multiples thereof, appear opposite said names on said list, until a sufficient number of such names are selected to make up the required number of prospective jurors.

2313.10 Notice to appear and testify before commissioners; purpose of testimony. (GC s 11419.12)

The commissioners of jurors may serve personally or by mail on any person within the county, a notice requiring him to attend before a commissioner at a specified time, not less than five days after service of the notice, for the purpose of testifying concerning his own qualifications or liability, or those of any other person, to serve as a juror. A person so notified must attend and testify accordingly.

2313.12 Exemptions of jurors; proof of exemption; certificates of exemption; record. (GC s 11419.14)

The exemptions of jurors shall be such as are prescribed by sections 2313.01 to 2313.46, inclusive, of the

Revised Code, and the general statutes of the state. The commissioners of jurors alone shall decide upon their qualifications and exemptions up until the time of notice for service, except as otherwise expressly provided in such sections; but the court may review and decide upon their qualifications and exemptions upon a written application and satisfactory legal proof at any time after they are notified and attend. The commissioners, upon request, shall issue to a person entitled to an exemption a certificate of that fact, which shall exempt the person to whom it is granted from jury duty during the time specified therein. Said commissioners shall keep a record of all proceedings before them or in their office, and of all persons exempted and the time and reasons for such exemptions.

2313.13 Service of jurors may be postponed; temporary excuse or discharge. (GC s 11419.15)

The court of common pleas may postpone the whole or a part of the time of service of a juror, after notice for service, to a later date during the same or a subsequent term of the same jury year or may excuse a juror, after notice for service, from service at that term for not more than three days at a time, where the exigencies of his business require his temporary excuse. The court may also discharge for the term, or excuse until a day certain, one or more jurors so notified and attending, whose further attendance is not required for the trial of issues at that term, or until that day. Each juror so excused or whose time of service is postponed until a day certain must attend at the opening of court on that day, and thereafter until he is discharged, without further notice.

2313.15 Report of names of jurors excused to subsequent term. (GC s 11419.17)

The commissioners of jurors shall report the names of all jurors excused to a subsequent term as provided in section 2313.13 of the Revised Code, to the officers attend-

ing the drawing of the jurors for that term, and each such name shall be placed upon the list of jurors drawn as provided by sections 2313.01 to 2313.46, inclusive, of the Revised Code. Such juror shall be made one of the total number directed to be drawn for that term, and no more names shall be drawn from the jury wheel than are sufficient to make up the number ordered by adding the names of the jurors so excused to the names then drawn.

The Supreme Court of the State of Ohio very recently in the case of **State ex rel, Burton vs. Smith,** 174 Ohio, State 429, had occasion to review the full range of the statutes dealing with the selection of Juries and Grand Juries in particular. As this Court pointed out, Section 2939.03 of the Ohio Revised Code provides that a "grand jury is drawn and notified by the same persons, from the same jury wheel, and in the same mannor as other jurors are drawn and notified" under the appropriate provisions of the code. And, in the words of Judge Gibson of the Supreme Court of Ohio in the **Burton case,** "except for the provision allowing the judge to select a foreman whose name is not on the jury list or on a ballot deposited in the jury wheel, the statute states, in what is ordinarily considered to be mandatory language, that the grand jury must be selected from the annual jury list and from the ballots deposited in the jury wheel as prescribed by law."

The Fourth Judicial District of the Court of Appeals sitting in assignment for the Seventh Judicial District of Ohio stated in its opinion in affirmance of the judgment of the trial court that the petitioner lost his right to move for the dismissal of the indictment because the question must be raised by challenge to the array before the grand jury is impaneled and sworn.

Your petitioner is at a complete loss to understand how any one who has been secretly indicted and who has never entered a plea to an amended indictment can avail himself of this remedy which the Ohio Court of Appeals says that the Ohio Statutes provides. Is it necessary for

every person who thinks it is possible that a grand jury might indict him to file a challenge to the array as soon as a jury is drawn and before it has been impanelled and sworn. Certainly the founders of the Constitution of the United States did not require any such ridiculous procedure as that.

This specification of error poses the first question that should engage the attention of this Court.

Since under the Constitution of the State of Ohio and the Constitution of the United States no person can be held to answer for a capital, or otherwise infamous crime unless on presentment or indictment of a grand jury; and since the Statutes of Ohio have laid down certain mandatory requirements for the selecting of jurors, can the failure to follow those requirements be the basis for a motion to dismiss an indictment.

If the answer to this question is in the negative and if a secretly indicted Defendant is confined, as the Ohio Court of Appeals held him to be, to a challenge to the array under the provisions of the Ohio Revised Code, then is not such a Defendant denied the due process guaranteed him by the 14th Amendment of the Constitution of the United States.

This matter has been recently ruled upon in the case of the United States vs. Hoffa, 196F, Supp. 25, (1961) the Court stated at Page 28,

> "however the motion to dismiss the indictment because of the manner in which the names of the jury men and women were selected and the evidence supporting the motion disclose that the jury was selected contrary to the mandatory requirements of law and these motions must be granted."

The Court further stated at Page 29:

> "although it is urged that the non-compliance involved is only an inconsequential or technical defect with no real prejudice shown to have resulted therefrom, it is the opinion of this Court that in the light of the controlling decisions of the Supreme Court of the United States, the importance of preserving the integrity of the jury system and the duty of the Court to require Court Officials to comply with the mandatory requirements of law in discharging their duties compel the conclusion that this defect is fatal to the indictment."

In this matter, petitioner was secretly indicted. He was not aware that anything pertaining to him was going to come before the grand jury. However, can he be required to object to the array prior to the time he did object, being the same day that he was served with the amended indictment, not only by filing with the Court a written objection but also renewing his objection orally at the time of trial (R 153). The petitioner was then ordered to stand trial on said amended indictment which clearly violated the constitutional guarantees given to him by the 14th Amendment of the Constitution of the United States.

Point II

The right to a public trial was violated wherein a jury was removed to the home of a witness and admittance into the home of said witness was refused to the public and to the press. A right to trial by an impartial jury was also violated wherein the witness was not within view nor hearing range of the jury, all of which is in violation of the due process of law under the fourteenth amendment of the United States Constitution.

A witness testifying without the presence of a jury precludes the jury from properly giving weight to the testimony of the said witnesses because the jury does not have an opportunity to observe the positiveness of the averments of the witness, nor does a jury have an opportunity to mediate the inconsistencies of the evidence which is presented by the witness.

In Knickerbocker Life Insurance Company vs. Foley, 105 U. S. 3, 5th 26. Ed. 1055, a Court held "that the jury would properly give weight to the testimony of the witnesses . . . according to their opportunities of observation of the . . . conduct." . . . Standard Oil Company vs. Van Etten 1 S. Ct., 178 . . 107 U. S. 325 . . . 27 L Ed. 319, "the court held the very spirit of trial by jury is that the experience, practical knowledge of affairs and common sense of jurors may be appealed to, to mediate the inconsistencies of the evidence and reconciled the extravagences of opposing theories of the parties."

During the course of the examination of the witness, Walter Pestrak, the jury was seated in the living room of the home of the witness facing a blank wall. The judge and a court reporter were in a hallway separating the jury and the bedroom that the witness was in. At no time during the course of the examination could the jury see the witness and the trial judge kept running back and forth between the door opening of the bedroom and the

door opening of the jury. The only persons who saw the witness were the defendant, the prosecutor, and the trial judge, and defendant's counsel, plus the fact that the jury was not within hearing range of the witness nor did the jury have an ample opportunity to observe the conduct of the witness, was in violation of the sixth amendment of the United States Constitution, wherein the defendant is guaranteed the right to trial by impartial jury and is in violation of the fourteenth amendment of the Constitution of the United States, wherein the defendant was deprived of liberty without due process of law.

It is fundamental law that the accused person has the right to test the recollection or to search the conscience of a witness, or to compel him to stand face to face with the jury in order that they may observe his expression and demeanor and the manner in which he gives his testimony, and therefore, to judge his credibility. To permit the present condition to stand upon the evidence as presented by the witness, Walter Pestrak, would be tanamount to a conviction by correspondence. Justice would not be dispenced by a court, where all the state would have to do would be to introduce testimony from any person or witness stating that the defendant was guilty of a crime for which he was charged.

The admittance into evidence of the testimony of the witness, Walter Pestrak, was a clear violation of the defendant's right to trial by an impartial jury and was, therefore, incompetent evidence.

> "It is admitted that erroneous rulings on evidence by a state court do not constitute a denial of due process, but a man cannot be deprived of his liberty without due process of law. The right to a fair trial is protected by the 14th amendment."

332 U. S. 46, 67 S Ct. 1672.

"Although it is admitted that the 14th amendment

is not to be taken as embodying the provisions of the 5th and 6th Amendments, and that there is no general rule that whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the Federal Government is now equally unlawful by force of the 14th Amendment if done by a state, less certain privileges and immunities which are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the 14th Amendment, became valid as against the states: See Palko vs. Connecticut, 302, U. S. 319, at page 326."

In Twining vs. New Jersey, 211 U. S. 78, . . . 29 S. Ct. 14, . . . 63 L. Ed. 97, it was stated:

"It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad Company vs. Chicago, 166 U. S. 226, . . . 17 S. Ct. 581, . . . 41 L. Ed. 979. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

The following language of Mr. Justice Roberts, at 316 U. S. 462 is pertinent:

"Its application, 14th Amendment, is less a matter of rule. Asserted denial is to detest it by the totality of facts in a given case. That which may, in one sitting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In

> the advocation of such a concept, there is always the danger of falling into the habit of formulating the guaranty into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

The criminal proceedings which resulted in petitioner's conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined.

The fundamental basis of the conception of due process is that the hearing must be a real one, not a sham or a pretense, if a conviction is permitted to stand on the strength of testimony given by a witness not within view or hearing range of the jury, then the protection of the 14th amendment's due process clause is meaningless. The opportunity for the jury to view and hear the witness during the course of his testimony was essential to the substance of a fair hearing. This is one of the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the 14th Amendment by a process of absorption.

Therefore, it is submitted that the violation of the principles of the 6th Amendment as to enjoyment of the right to a speedy and public trial by an impartial jury of the state in this case, at least, is violative of the due process clause of the 14th Amendment.

The trial court's removal of the jury to the home of the witness was also a denial of due process of law in that the defendant was denied the right to a public trial.

In 48 S. Ct. 468 . . . 277 U. S. 81 . . . 72 L. Ed. 793, Gaines vs. State of Washington, it was held:

> "Trial Courts announcement during murder trial that general public would be excluded held not denial of due process, when not carried out."

From the language of the Court in stating that denial of due process did not occur because said announcement was not carried out, there is an indication that denial of due process would have occurred if said announcement would have carried out. In the case of the petitioner, it was not only an announcement that the general public would be excluded but there was, in fact, an exclusion of the general public, as well as members of the press. Therefore, there is no question that the action in removing the jury and the trial to the home of a witness was a clear denial of the petitioner's rights to a public trial.

Point No. 3

Due process of law under the 14th Amendment was violated in permitting the prosecuting attorney of the objection of the petitioner to cross-examine said petitioner as to matters completely collateral and not associated in any way with the crimes charged in the amended indictment and in failing to instruct the jury as to the reason for permitting the latitude given to the prosecuting attorney in this examination.

The judicial act of Judge Birrell at the trial in the Common Pleas Court of him permitting the prosecuting attorney to cross-examine the defendant as to the commission of other offenses, occupations, and situations wherein the petitioner was questioned by Federal and State authorities was clearly a denial of the concept of due process of law:

> "It is almost universally agreed that the state is not entitled to introduce evidence of the bad character or reputation of accused unless he has clearly and expressly put his character in issue by introducing evidence of good character. So long as accused does not offer evidence of good character this rule operates to preclude a general attack on his character even though he testifies as a witness and as appears evidence of bad character introduced by the state to impeach his credibility as a witness cannot be considered as substantive evidence of guilt.
>
> It follows from the foregoing, that if accused's character is not in issue, the state may not offer evidence of the commission of other offenses reflecting on accused's character. The following cases show that evidence at a prior time was arrested is inadmissible; that the accused was indicted is inadmissible; or convicted of another of-

fense; or that he had been in the penitentiary; or that he had associated with persons of bad character is inadmissible: Weiner vs. U. S. 20 F2d 522; King vs. State 142 S. E. 160 166 Ga. 10; State vs. Gilstrap, 147 S. E. 600 149 S. C. 445; Mackreth vs. US 103 F2d 495; Campbell vs. US 47 F2d 70; Foy vs. State, 155 So. 657, 115 Fla. 245; People vs. Emerling 173 NE 474, 341 Ill. 424; State vs. Simpson, 237 SW 748; Cheney vs. State, 7 Ohio 222."

In Jordan vs. State, 144 So 669 . . . 107 Fla. 33, it was held:

"The defendant as a witness in his own behalf, while subject to legitimate cross-examination, just as is any other witness, does not lose his status or character as a defendant on trial, whose character or reputation it is not permitted to the prosecution to attack, under the guise of a pretended questioning on cross-examination, the principal effect of which is calculated to be an attack on character or reputation of the accused as such, so as not to induce a more ready belief that he is guilty of the charge on which he is being tried."

The trial court permitted the prosecution to ask the following questions of the accused:

1. Are you a gambler?
2. Have you been convicted of a felony?
3. Did you serve time in the penitentiary?
4. You've been a bodyguard before among your occupations, have you not?
5. Do you know the police chief in Niles?
6. Did you have anything to do with placing of dynamite on his porch?

Each of the foregoing questions were calculated to be

an attack on the character or reputation of the accused as such, so as to induce a more ready belief that he is guilty of the charge on which he is being tried and said questions were brought under the guise of a pretended questioning on cross-examining.

In 245 U. S. 559, it was held:

> "Character is not an issue in the case unless the prisoner chooses to make it one."

In 271 U. S. 494, Raffel vs. U. S., the Court said that "on cross-examination, the prosecution is limited to facts in issue." In this case the convicted's character was never put into view by the defense, therefore, it was not subject to attack upon cross-examination. Wherein, prosecutor's attacks on cross-examination of the defendant's character and reputation with the authorization to do so by the trial court was clearly in abuse of the privileges and rights guaranteed the defendant under the fourteenth amendment for a fair and just trial.

Thus, it is submitted that due process of law required the prosecution to refrain from attacking the character or reputation of the defendant under the guise of a pretended questioning on cross-examination, the principal effect of which is calculated to be an attack on character or reputation of the accused as such, so as to induce a more ready belief that he is guilty of the charge on which he is being tried.

A secret indictment was issued by the September term of 1961 of the Trumbull County Grand Jury, charging the defendant with four separate and distinct crimes, to-wit:

Count 1—Threatening to kill Eugene Brady with intent thereby to extort money, namely $200,000.00 contrary to Section 2901.32 of the OHIO Revised Code;

Count 2—Threatening to kill Paul Cicchini with intent thereby to extort money, namely $200,000.00 contrary to Section 2901.32 of the Revised Code of Ohio;

Count 3—In conspiracy with Frank Cickelli, did unlawfully obtain possession of certain property of Al Cicchini, Rocco Ferrera, and Eugene Brady, to-wit: $10,000.00 with their consent induced by false representations, to-wit: that he and Frank Cickelli represented Mayor Walter Pestrak, contrary to Section 2907.21 of the Ohio Revised Code.

Count 4—Did corruptly attempt to influence Rocco Ferrera in the discharge of his duties as a witness who was to appear before the September term of the Trumbull County Grand Jury, contrary to Section 2917.07 of the Ohio Revised Code.

The questions presented to the defendant on cross-examination by the prosecution over the objection of defense counsel, said questions being hereinabove listed, did not directly or even remotely pertain to the charges upon which the defendant was standing trial. There is nothing contained in said questions regarding the facts as to whether or not the defendant attempted to extort money in any way from anyone nor was there anything in said questions pertaining in misrepresentation by this defendant nor was there anything contained in said questions regarding the discharge of duties of a witness in appearing before the September term of the Trumbull County Grand Jury. The sole premise for the questioning of the defendant on cross-examination as to the matters hereinabove recited was the fact of the character and reputation of the defendant to induce a more ready belief that he is guilty of the charge on which he was tried, all of which is in violation of the fourteenth amendment.

Point No. 4

Due process of law under the 14th amendment requires a resubmission of the case to the grand jury after the indictment was amended by the prosecuting attorney by and through permission granted by the trial court wherein the indictment was amended by changing Count 3 therein to read: "In conspiracy with Frank Cickelli, did unlawfully obtain possession of certain property of Al Cicchini, Rocco Ferrera, and Eugene Brady, etc." The original indictment in Count 3 charged the defendant as a principal only.

The fifth amendment of the Constitution of the United States of America provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty or property without due process of law . . ."

The 14th Amendment of the United States Constitution provides that "no state shall deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws."

It is admitted that the 14th Amendment is not to be taken as embodying the provisions of the 5th Amendment and that there is no general rule that whatever would be violation of the original bill of Rights, Amendments 1 through 8, if done by the Federal Government, is now equally unlawful by force of the 14th Amendment, if done by that state, nevertheless, certain privileges and immunities which are valid as against the Federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of bordered liberty, unless through the fourteenth amendment became valid as against the states: See Palko vs. Connecticut, 302 U. S. 319, at page 326.

In Twining vs. New Jersey, 211 U. S. 78, at page 99 . . . 29 S. Ct. 14, 19, . . . 63 L. Ed. 97, this Court stated:

> "It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad Company vs. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

The fundamental basis to the conception of due process is that the hearing must be a real one, not a sham or pretense. If a conviction is permitted to stand on an amended indictment without a resubmission to the Grand Jury for determination on said indictment as amended, in the protection of the 14th Amendment's due process clause is meaningless. Upon the indictment as changed and amended, the Court can proceed no farther. There is nothing which the current prisoner can be held to answer. A trial on such indictment is void. There is nothing to try.

In 121 U. S. 1, Ex Parte Baine, it was held:

> "If particulars are added to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found."

When this indictment is filed with the Court, no change can be made in the body of the instrument by order of the Court, or by the prosecuting attorney, without a resubmission of the case to the Grand Jury, and the fact that the Court may deem it immaterial as striking out of surplus words, makes no difference. The instru-

ment, as thus changed, is no longer the indictment of the grand jury which presented it.

Upon an indictment so changed, the Court can proceed no farther. There is nothing (in the language of the Constitution) which the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to try.

The Trial Court's decision in permitting the prosecuting attorney to amend the indictment, naming the defendant a co-conspirator instead of a principal was not only a gross abuse of discretion of the trial court but a denial of the due process clause contained in the 14th amendment of the United States Constitution.

Therefore, it is submitted that the violation of the principles of the 5th amendment as to the provision wherein no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury is violative of the due process clause of the 14th amendment.

Thus, it is submitted that due process of law required the resubmission of the case to the grand jury after the aforementioned amendment of the said indictment, and the failure to so submit was a denial of the due process clause contained in the 14th amendment.

The criminal proceedings which resulted in petitioner's conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined on the indictment of the grand jury which presented it and not upon the indictment as amended by the prosecution.

CONCLUSION

The foregoing questions were specially set up and claimed and brought to the attention of the Court at every stage, orally and particularly in the briefs filed on behalf of the Petitioner in the Court of Appeals and in the Supreme Court of Ohio and be oral argument in said Courts.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that rights under the Constitution of the United States be preserved and that to such an end a Writ of Certiorari should be granted and this court should review the judgment of the Supreme Court of Ohio and finally reverse it.

Respectfully submitted,

JOHN R. SPAIN

GEORGE ALEXANDER

Attorneys for the Petitioner

PROOF OF SERVICE

I, LYNN B. GRIFFITH, JR., prosecuting attorney of Trumbull County, Ohio, hereby acknowledges receipt of a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio this ..... day of September, 1963.

.....

LYNN B. GRIFFITH, JR.

STATE OF OHIO, TRUMBULL COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,
PLAINTIFF-APPELLEE,

vs.

PAUL LAMONGE,
DEFENDANT-APPELLANT

OPINION

Case No. 1530

APPEARANCES

Lynn B. Griffith, Jr., Prosecuting Attorney, Warren, Ohio, for Plaintiff-Appellee.

John Spain, Warren, Ohio, for Defendant-Appellant

Hon. William D. Radcliff

Hon. James Collier

Hon. William B. Brown, JJ.
of the Fourth District
sitting by assignment in
the Seventh District

Dated: November 7, 1962

Grace Marten,
Court of Appeals Reporter
Mahoning County Courthouse
Youngstown, Ohio

RADCLIFF, P. J.

A full understanding of this case necessitates a review of the history of the Warren Sewer Improvement Project, particularly that portion known as Phases B and C. Phase B consists generally of the construction of a sewer to collect storm water and deposit it in the Mahoning River, thus diverting the same out of the Warren Sanitary Sewer System. Phase C involves the construction of a sewer generally following the path of the Mahoning River. The purpose of this line is to intercept existing sewer lines, to collect the sewage presently dumped raw into the Mahoning River by such existing lines, and to carry the sewage to a new sewage treatment plant. The cost of these phases of the project is in excess of four million dollars.

The engineering firm of Havens and Emerson, Cleveland, Ohio, was employed by the City of Warren to conduct the necessary surveys, to draw the plans and specifications, and to submit the estimates for this project. In May, 1960, after the engineering survey had been completed, the City Council of Warren passed an ordinance authorizing the Safety-Service Director to advertise for bids for Phases B and C of the sewer improvement project. The ordinance passed contained no authority for the Board of Control, i. e. the Mayor and the Safety-Service Director, to award a contract on the basis of the bids, nor did it contain any of the necessary fiscal authority to finance the project. It is to be noted that the City Council of Warren employed this tripartite legislative technique throughout the period in which the project was to be let. The authority for advertising for bids, the authority for awarding the contract, and the fiscal legislation were each handled by a separate ordinance. The net effect of this scheme was to give the Council control over the contract at three different levels.

First bids were received and opened on August 1, 1960, but Council passed no ordinance authorizing the

Board of Control to enter into a contract with the low bidders. Instead a second advertisement for bids was authorized. These bids were received on October 7, 1960. Again Council failed to pass the necessary ordinance authorizing the Board of Control to award a contract. Bids were received for the third time on March 16, 1961, at which time the Rocco Ferrera Company and the Boam Company of Lavonia, Michigan, bidding together in a joint venture were low bidders on Phase B of the project. The Al Monzo Construction Co. of Monroeville, Pennsylvania, was low bidder on Phase C of the project. At this letting, contractors had been invited to submit separate bids on each phase of the project, also combined bids on both phases. The low bid on the combined bid for both phases had been submitted by the Boam-Ferrera Companies. Havens and Emerson recommended to the city that it accept this combined bid as the lowest and best bid for both phases even though total dollar cost of the combined bid was slightly in excess of the total of the Ferrera-Boam bid on Phase B and the Monzo bid on Phase C.

On May 5, 1961, the City Council passed an ordinance authorizing the Board of Control to enter into a contract with the Ferrera-Boam Companies on both phases of the project. On June 6, 1961, a contract was signed between the city and the Ferrera Boam Companies for the construction of Phases B and C.

With this broad outline of the legislative history and of the project in mind, it is now necessary to return and trace the activities of Raymond Little and other members of the Warren City Council during the bidding of the project. Their activities provide the necessary background for the entry of Lamonge into the picture and for his actions which led to his indictment and trial. In the summer of 1960 three members of the Warren City Council, Raymond Little, John Janosik, and Jack Flask initiated a series of meetings with officials of the Ferrera-Boam Companies whom they knew to be interested in bidding on the

Warren Sewer Improvement Project, as a joint venture. Officials of the Ferrera Company included its president, Rocco Ferrera, and Al Cicchini, vice president and secretary. Officials of the Boam Company included Pat Brady and his son, Eugene Brady, its secretary and treasurer. Negotiations on behalf of the Boam Company were carried on by Eugene Brady, while negotiations on behalf of the Ferrera Company were carried on by both Mr. Ferrera and Mr. Cicchini. From the outset the three councilmen made it clear to the officials of the Boam and Ferrera Companies that they were interested, by various corrupt ways and means, in receiving illegal benefits from the Warren Sewer Improvement Project. Meetings took place in various cities. Ways and means were discussed, in general terms, whereby the councilmen could make money from the project. These included direct payments by the contractors upon the award of the contract, the eventual addition of nonexistent "extras," (a scheme to be consummated by the device of employing a resident engineer who would recommend certain changes in the basic contract involving the expenditure of additional money and then certify that such "extras" had been put into the job when in fact they had not) and commissions on materials.

By mid-April, 1961, no specific agreements had been reached between the officials of the Boam-Ferrera Companies as to the ways and means or amounts to be involved in the various forms of illegal payments to the councilmen. The following then is the situation in mid-April. From the point of view of the legislation, bids had been made for the third time but the necessary second and third steps of authorizing the Board of Control to award the contract and to provide financing had not been taken. The contract, of course, had not been signed. Negotiations as previously stated between the councilmen and the contractors had not yet resulted in any specific agreements. It is at this point that Frank Cickelli entered the picture. After a preliminary meeting between the officials of the Boam-Ferrera Companies and Mr. Cickelli in Cleveland in mid-

April, arrangements were made for a meeting to be held on May 7, 1961. This meeting took place at the home of Frank Cickelli. The initial portion of the meeting was concerned with the negotiation of an exact figure to be paid by the contractors in return for their being awarded the contract. It was finally agreed that the sum of $35,000.00 would be paid jointly to Cickelli and Little. Following this there were further discussions at the meeting involving other ways and means for getting money into the hands of Cickelli and the councilmen. These conversations concerned the technique to be used in putting fictional "extras" on the job.

It was also at this meeting that Cickelli first indicated that he would take care of contract matters as far as the Mayor of Warren, Walter Pestrak, was concerned. This was a representation which both he and Lamonge made on several other occasions.

Two weeks later at Cickelli's home in Warren, Brady, Cicchini, and Cickelli held another meeting. The purpose of this meeting was for the contractors to meet the defendant, Paul Lamonge. The defendant was introduced by Cickelli as a trucker. Cickelli requested that the contractors hire him on the job. After the defendant left, Cickelli pointed out to the contractors that Lamonge could be used in the scheme to affect the payoff. He suggested that since Lamonge was doing the trucking he could present false bills and be paid by the contractors for work not actually performed. The purpose of this plan was to get illegal monies that could be paid to Cickelli and others out of the companies without income tax being paid thereon. Mr. Little also came to the Cickelli home during this meeting and inquired if the $35,000.00 agreement was still in effect. He was assured that it was.

Meanwhile City Council had passed the necessary legislation; the Board of Control had awarded the contract to the Boam-Ferrera Companies and finally, in July,

the City of Warren entered into a written contract with the Boam-Ferrera Companies for the construction of phases B and C of the Sewer Improvement Project. In the latter part of July, 1961, Al Cicchini, who was to be field manager on the job, moved to Warren to set up his office and to make preparation for the beginning of work. During the first couple of weeks in town he was frequently contacted by Cickelli. Cicchini and Cickelli had dinner and meetings together at which meetings Mr. Cickelli again assured Cicchini that he represented the Mayor. At one of these meetings in the latter part of July, Cicchini asked Cickelli to have Paul Lamonge stop in the company office to discuss trucking. Lamonge appeared at the Boam-Ferrera office on the afternoon of August 2, 1961. At this time the defendant indicated to the contractors that he wished to have control of all subcontracting and material purchases; however the contractors stated they had no such understanding of Lamonge's role in the project. The defendant immediately placed a call to Frank Cickelli suggesting another meeting with Cicchini and Brady to straighten out the matter. This meeting was held at the Chateau Restaurant in Warren. After dinner Cickelli advised the contractors that he had to make a speech in Vienna, Ohio. He requested that the contractors drive him there so that they could discuss business on the way. On the way to Vienna the defendant insisted that Cickelli make clear to the contractors just what his position was to be. Finally Cickelli told the defendant that he was to work hand-in-hand with Cicchini, to do everything for him, and to buy everything for him.

When they reached Vienna the discussion turned to the $35,000.00 previously agreed upon at the May 7th meeting. The contractors mentioned having seen Mr. Little. Cickelli advised them that Little was not to get any of the money but that the contractors were to pay the $35,000.00 to the defendant Paul Lamonge and nobody else. The contractors objected and stated that this was not the original agreement; however Cickelli reiterated that Lamonge was to get the money or else someone would get hurt.

Following this, work on the job began in earnest. Paul Lamonge began to appear on the job daily, suggesting a series of schemes to get control over the purchase of material and the letting of subcontracts. He demanded from the contractors the prices of material bids from potential suppliers so that before the contracts could be awarded for material or work he could extract "contributions" from the subcontractors and suppliers.

Cickelli, meanwhile, continued to meet with Cicchini during which time two matters of importance were discussed. The first of these was an arrangement for a down payment on the $35,000.00. It was agreed that the contractors would make a down payment of $10,000.00 in cash. The second topic of discussion concerned the ways and means by which the balance of the money could be paid, the problem being the same one which had existed from the beginning, that of getting a large sum of money in and out of the corporation without an undue tax burden. It was finally suggested at a meeting of Cickelli, Cicchini, Lamonge and Brady that a sales commission could be paid on the material purchased. The obvious source was the purchase of the concrete pipe as the job called for over one million dollars worth of this material. It was pointed out that an arrangement could be made to have a sales commission paid by the company supplying the pipe to a firm of Mr. Cickelli's choosing so that he could get the money. In accordance with this plan, Cickelli introduced Mr. Cicchini to an official of a company known as the M & W Sales Corporation and told Cicchini that the commission could be paid to them. The M & W Sales Corporation had nothing to do with the supplier, American Vitrified Pipe Company. Actually the contract had already been entered into sometime previously by Cicchini; however, this dummy arrangement was set up in order to enable the money to be paid to Cickelli. Through all these meetings in August, Cickelli continued to indicate to Cicchini and Brady that he represented the Mayor. Meanwhile Lamonge also told the con-

tractors that he and Cickelli would take care of matters as far as Mayor Walter Pestrak was concerned. Lamonge also requested of the contractors that he be introduced to Haven's and Emerson's resident engineer, Howard Brown, for the purpose of getting a program of fictional "extras" started.

Though he had agreed, Cicchini was concerned by the change in arrangement for the payment of the money originally scheduled to go to Little and Cickelli and now to be paid to Lamonge. He therefore stalled the payment of any sum until the return from Europe of his company president, Rocco Ferrera. Upon Mr. Ferrera's return, a meeting was arranged between Cicchini, Ferrera and Cickelli. They met at Cickelli's house and again Cickelli insisted that the money be paid to Lamonge. In addition, there was a subsequent meeting at a local restaurant at which Cickelli again brought up the subject of subcontractors. He stated that he wished to send subcontractors around, and that if they would get contracts, contributions would be obtained from them in return for their getting the work.

Acting on the statements of Cickelli and Lamonge that they represented Mayor Walter Pestrak, the contractors paid the sum of $5,000.00 to Paul Lamonge on August 22, at the field office of the Ferrera-Boam Construction Company. On August 27th, an additional $5,000.00 was given to the defendant in the Warner Hotel room of Cicchini.

The contractors felt that they had met $10,000.00 of their $35,000.00 obligation, and that the other $25,000.00 would be forthcoming from the sales commission to be paid to the M & W Company. The events of August 29th, however, showed that Cickelli and the defendant, Lamonge, had no intention of being satisfied with $35,000.00.

In order to explain the background of the events of August 29th it must be remembered that at the third bidding, Monzo Construction Company had been low bidder on Phase C. When the contract was awarded to Boam-Ferrera, Monzo Construction Company brought suit to set the contract aside and to award the contract for Phase C to Monzo Construction Company. (See State ex rel., Al Monzo Construction Co., Inc., vs. Board of Control of City of Warren, Ohio, et al, 172 Ohio St., 370). As a result of his lawsuit; negotiations had been carried on between Al Monzo and Eugene Brady, with the view to subletting some of the work to Monzo as a means of settling the suit. On this discussion of subletting, approximately one million dollars worth of work on Phase C was to go to Monzo Construction Company in return for which Monzo would drop its suit.

Having learned of these negotiations between Brady and Monzo, Lamonge came to the Ferrera-Boam offices in Warren on August 29th and demanded that Al Cicchini tell him why he had not been informed of this. He claimed that he was to have control of the letting of all subcontracts for the purpose of obtaining contributions from each and every subcontractor. Cicchini insisted that this was not the case and that the only promise he had made was that subcontractors sent by Cickelli would be awarded the work, providing their price was competitive. Lamonge continued to insist that he have control over all subcontracts. Heated arguments followed. After threatening Eugene Brady, Lamonge again suggested that Cickelli be contacted to confirm Lamonge's role on the job. Lamonge and the contractors went to the Cickelli home but did not see Cickelli. Lamonge stated that a note he showed the contractors had been written by Cickelli, which note indicated that whatever Lamonge wanted should be done by the contractors. The following noon Paul Lamonge came to the office of the Ferrera-Boam Companies looking for Eugene Brady. He brought with him four cars, which he stated were filled with his "boys"

who were ready to take care of Gene Brady. Brady was not at the office. Lamonge showed some of the cars with the men to Mike Ferrera, son of Rocco Ferrera, and told the young boy it was lucky for Brady that he was not there.

When Cicchini and Brady returned from lunch they received a report of this visit from Mike Ferrera and almost simultaneously Lamonge returned to the office. He immediately made it clear that his intended purpose in coming to the office was to bring the contractors into line by threats. He returned $5,000.00 to Brady and told him to get out of town within one hour. Turning to Cicchini, he advised him that he should also get out of town and that his money would be returned later. The contractors made immediate perparations to leave Warren. They left and all work on the project ceased.

We apologize for the length of the preceding resume.

On October 13, 1961, the Grand Jury of Trumbull County for the September 1961 Term indicted Lamonge as follows:

1. Threatening to kill Eugene Brady with intent to extort money contrary to Section 2901.32 of the Revised Code.

2. Threatening to kill Al Cicchini with intent to extort money contrary to Section 2901.32 of the Revised Code.

3. Obtaining $10,000.00 by false pretenses contrary to Section 2907.21 of the Ohio Revised Code.

4. Corruptly attempting to influence a witness in the discharge of his duties, contrary to Section 2917.07 of the Ohio Revised Code.

Lamonge was arraigned on October 17, 1961, and entered a plea of not guilty to all four of the offenses charged in the indictment. Lamonge was granted time in which to attack the indictment in any method he deemed best.

On Ocober 19, 1961, Lamonge demurred to the fourth count of the indictment. The demurrer was overruled on January 31, 1962, but as the fourth count of the indictment was dismissed during trial, we will not concern ourselves further with that phase of this cause.

On January 30, 1962, Lamonge filed three motions:

1. To dismiss the indictment because the September 1961 Grand Jury of Trumbull County was illegally selected.

2. To require the State to elect as to which count of the indictment he expected to proceed on at trial.

3. For a change of venue of the trial.

These motions were overruled January 31, 1962.

On January 31, 1962, the indictment was amended by adding the words, "in conspiracy with Frank Cickelli" to the third count of the indictment. The offense charged in this court, after amendment was larceny by trick while in furtherance of a conspiracy.

Trial was started in the Common Pleas Court of Trumbull County on February 5, 1962. On February 11, 1962, the jury returned its verdict finding Lamonge guilty of the offense charged in the first count (extortion as of Brady) and third count (larceny by trick while engaged in a conspiracy) and not guilty of the second count (extortion as to Cicchini). After journalization of the findings of the jury a motion for a new trial was filed, and subse-

quently overruled. Lamonge perfected this appeal. Lamonge urges the following assignment of error:

1. The Court erred in overruling defendant's motion to dismiss the indictment returned against defendant for the reason that the panel of persons drawn to serve as Grand Jurors was not selected according to law and was improperly drawn.

2. The verdict and judgment of the jury was not substantiated by sufficient evidence and was contrary to the weight of the evidence.

3. The Court erred in permitting the introduction by the state of evidence of conversations between witnesses and third parties at which defendant was not present, with no proper foundation laid or proof of conspiracy.

4. The Court erred in sustaining the motion of the prosecution in moving the court and jury to the home of the State witness, Walter Pestrak, and in ordering the court, jury, and defendant to said home over the objection of the defendant.

5. The Court erred in permitting the prosecuting attorney, over the objection of the defendant, to cross-examine the defendant as to matters completely collateral and not associated in any way with the crimes charged in the amended indictment.

6. The Court erred in its charge to the jury.

7. Misconduct of the prosecuting attorney regarding his comments of the case while appeal was pending.

We will endeavor to pass upon each of the assignments of error in the order in which they are set forth.

The first assigned error is not well taken as it was not preserved. Before we are obliged to consider assignments of error the question must be properly raised in the trial court and preserved in such a manner as to bring it directly before us. Let use see what happened here. Lamonge was arraigned on October 17, 1961, at which time he was assured that he would be given three days in which to attack the indictment. (See Appendix to transcript in the Court of Appeals.) This certainly was the place to begin if there was any question as to the selection or composition of the Grand Jury. There was no request by Lamonge to withdraw his plea and to tender a plea in abatement or challenge to the array. Instead Lamonge demurred only to the fourth count of the indictment whereby he was charged with tampering with a witness on the ground that the indictment did not allege an offense punishable under the laws of the State of Ohio. Nothing further was done on this score until January 30, 1962, at which time Lamonge moved to dismiss the indictment (all four counts) because the indictment had been returned by an illegally chosen Grand Jury. The supporting authority for said motion was that:

> "...in the case of the State of Ohio vs. Raymond Little, Case No. 11628, this same court, had sustained a motion challenging the array from which the Grand Jury was selected."

No request to withdraw his plea was made. No hearing was had on said motion; none was requested, and no evidence was offered in support thereof. The motion was perfunctorily overruled on January 31, 1962.

The question re-appears on page 152 of the bill of exceptions:

> "MR. SPAIN: Your Honor I would again like to renew our motion which the Court has previously overruled dismissing the indictments against this

defendant for the reason that the Grand Jury which rendered these indictments, that is the September Term of the Grand Jury was illegally selected as was ruled by this Court in the State of Ohio vs. Raymond Little.

"COURT: Well I don't think that this Court overruled that Grand Jury was illegally selected, but the motion will be overruled. That motion will be overruled.

"MR. SPAIN: I would like to correct my statement. That this Court did not rule, that this Court did rule that the array, the original array from which the Grand Jury had been selected, that is the jurors who had been selected from the jury wheel of which this Grand Jury was taken was illegal and improperly selected.

"COURT: Well, the proceedings of this case have gone forward and there was no challenge made to the array before or at the proper time in this case, and consequently again I must say to you I believe the motion is properly overruled.

"MR. SPAIN: Well, Your Honor I might further say this. That was very true that a motion challenging that array of the Grand Jury was not made prior to the time they were sworn. However, the Court must bear in mind that the indictments rendered by this Grand Jury were secret indictments, that Mr. Lamonge had no way of knowing that he was to be the subject of investigation, that he was to be considered by this Grand Jury, and consequently had no opportunity to challenge this array.

"COURT: I believe that he had been indicted some weeks before he had been originally indicted, and remained on bond some weeks before he was re-

quired to plead to the indictment so that he had an opportunity to challenge the array had he desired to do so. These are all matters that is no use of our arguing.

"MR. SPAIN: That's right.

"COURT: These are matters which must depend on the record.

"MR. SPAIN: That's right."

The issue again submerged and finally appears as the second ground in Lamonge's motion for a new trial.

This alleged error was not at any time properly presented to the trial court by either challenge to the array or a plea in abatement. There is no shred of evidence or even argument as to what the impropriety in selection of the grand jury was. There is no means by which we may determine whether Lamonge was deprived of a fair trial or not. The urged error was not preserved. See Revised Code Sections 2941.29; 2941.53; 2941.55; 2941.59; Revised Code Sections 2953.01 to 2953.14; 3 Ohio Jurisprudence (2d), 61 et seq., Section 200 et seq.; and State of Ohio vs. Schultz, 96 Ohio St. 114; State of Ohio vs. Tudor, 154 Ohio St., 249; State of Ohio vs. Glaros, 170 Ohio St. 471.

The next question presented is our old friend the weight and sufficiency of the evidence. In this case, as in all criminal cases, the evidence is in conflict, often directly so. The fact that conflict exists or that there is inconsistency in the testimony introduced by the State has never been grounds for reversal in Ohio. The true test is that the evidence to convict must be of such a nature that its character is sufficient to satisfy reasonable minds of the guilt of the defendant. These reasonable minds are those of the jury and not the minds of the reviewing court. There is ample evidence in this record to sustain any con-

clusion that may have been reached. The jury believed the evidence that established guilt on two counts and lack of guilt on the other count. The jury believed the evidence which dictated that result. To them it had probative characteristics, consequently, we cannot find that the evidence is insufficient or that the verdict is against the manifest weight of evidence. This assignment of error is not well taken. See State of Ohio vs. Shively, 172 Ohio St. 128; same case in Court of Appeals, 86 Ohio Law Abstract 71; State of Ohio vs. Letts, 106 Ohio App., 285, Sandoffsky vs. State, 29 Ohio App., 419, Syl. 1, 2, 3, and 3 Ohio Jurisprudence (2d), 820 et. seq.

The order in which testimony is admitted is within the discretion of the trial judge and in the absence of an abuse of this discretion cannot be the basis for prejudicial error. It seems to us that this cannot be established in this trial. Perhaps some declarations were admitted prior to establishment of a prima facie case but it was certainly not very premature. We feel that there can be no question that the existence of a conspiracy was established which rendered the out of order admission of testimony, if any was so admitted, harmless and immaterial. There are numberless cases wherein the law has been declared to be as set forth above. We cite only the following landmarks: Fouts vs. State, 7 Ohio St., 471, Syl. 2; Falls vs. State, 43 Ohio App., 129, Syl. 3, appeal dismissed 124 Ohio St., 660, Sandoffsky vs. State, 29 Ohio App., 419, Syl. 4 and 5; State vs. Anthoulis, 62 Ohio App., 113, Syl. 4, appeal dismissed 135 Ohio St., 631; State vs. De Righter, 145 Ohio St. 552, at page 557. In addition to the above cases these texts are very helpful: 2 Wharton's Criminal Evidence (11th Ed.) 1198 et seq., and 3 Underhill's Criminal Evidence (5th Ed.) 1934 to 1937. The third assignment of error is not well taken, therefore overruled.

The question raised by the fourth assignment of error is interesting from an academic point of view but certainly cannot be the basis for prejudicial error as we view it.

We feel that the situation is analogous to that which the Legislative envisaged when Sections 2945.49 to 2945.55 of the Revised Code were enacted. These statutes provide on means by which the testimony of a deceased, absent, or sick witness may be obtained. It is certainly not the only method as no exclusionary language is employed in the statutes. It guarantees the defendant in a criminal case two rights: namely, confrontation and cross-examination. These rights only apply to a living witness as we have in this case. There is no such guarantee as to a deceased witness. The greatest latitude is allowed to prove identification, which often is the most serious problem in criminal cases. **In the session of the court at the home of former Mayor Pestrak conditions were not ideal. We grant this, but we also feel that they did not reach the pinnacle of confusion and bedlam described by the appellant.** During that time Lamonge was within a few feet of the witness and was afforded an opportunity to cross-examine. This he did in depth and detail. The trial judge was in the presence of the witness, the attorneys involved, and the court reporter. There is no provision in the statutes concerning testimony of absent or ill witness s for the jury to see and appraise such witnesses. It is not even contemplated. We dare say that many of the jurors in Mayor Pestrak's home on February 8, 1962, saw a great deal more of the witness than they would have if a deposition had been used. We feel that no prejudicial error is raised by this assignment of error.

The next assignment of error could well be covered in our treatment of Assignment VII concerning the question of misconduct of counsel. When you first examine the portion of the bill of exceptions referred to in Appellant's brief discussing Assignment V that is the implication created. Particularly is that true of that portion of the cross-examination by the Assistant Prosecuting Attorney concerning a bombing in Niles; however, careful re-examination of the record leads to an entirely different conclusion. At the end of the State's case on February 8, 1962, this interesting statement appears:

"MR. SPAIN (at Bench): I move that starting tomorrow morning we have a separation of witnesses —starting tomorrow at nine o'clock.

"MR. GRIFFITH: I doubt if any witnesses have been in here.

"MR. SPAIN: I don't want Cecil in here tomorrow morning. He is the F. B. I. man, and that's the only reason I am moving otherwise. I had no intention, I purposely kept from moving; as long as he walked in I changed my mind."

The foregoing clearly indicates that Lamonge had recently been questioned by the F. B. I. concerning a bombing in Niles. The prosecuting attorney obviously knew of this as did the attorney for Lamonge. On cross-examination, the Prosecuting Attorney attempted to lay the foundation for impeachment concerning this incident. Lamonge did not deny making certain statements to the F. B. I. agent, consequently, the agent could not be called on rebuttal to impeach. It is to be regretted that the questions had to be about an incident involving a bombing; however that was not the fault of the State of Ohio. The other questions were proper as they involved convictions for criminal activity in the past by Lamonge. To a certain extent all of us are pilloried by our past. The only thing we can do about this is to be sorry, either that we made the mistake and make amends or to be sorry that we were caught and continue our reprehensible conduct. The fifth assignment of error is not well taken.

For the sixth assignment of error Lamonge claims the Court erred in its charge to the jury in that the instructions as given on aiding and abetting and the element

of intent are not adequate or complete and that the court failed to give any instruction on motive or lack of motive. These alleged errors, if any, are errors of omission and not commission. The court's instructions must be considered as a whole not by words, phrases, and clauses taken out of context. We have carefully examined the charge of the court and have found no error of any consequence. This is especially true in the absence of any request for further instructions on any phase of the case. When counsel both for the State and the defendant were given an opportunity by the court to make such requests both answered in the negative. Motive is not an essential element of either offense of which the defendant was found guilty.

The only objection to the charge by the defendant was as follows:

> "MR. SPAIN: Give me general objections to the entire charge of the court." (R. 571.)

We must always remember that to be error warranting reversal the error must be one of commission and not of omission. The sixth assignment of error is overruled.

The seventh and final assignment of error has to do with a public utterance made by the Prosecuting Attorney of Trumbull County to the Kiwanis Club of Girard, Ohio. The speech was made after the conviction of Lamonge in the Common Pleas Court. The cause was pending in this court on appeal. From a newspaper clipping appended to appellant's brief we gather that the speech was made on June 5, 1962. In the speech the Prosecutor complained about the rule prohibiting the use of illegally obtained evidence in criminal cases in court often resulted in acquittals. The Prosecutor also played a tape recording of

an alleged telephone conversation between Lamonge and Rocco Ferrera. This evidence you will recall pertained to the fourth count of the indictment charging the offense of tampering with a witness. That charge was dismissed and did not go to the jury.

The appellant relies entirely on the dicta of Judge Clark of the United States Circuit Court of Appeals, Second Circuit, in the case of U. S. vs. Bufalino, 285 Fed. (2d) 408 at page 419. Careful examination of this case reveals that Judge Clark thought it **improper** for special prosecutors to write and speak about that notorious case while the appeal was pending. It was the famous "Appalachin Conference" case. This so-called misconduct of counsel was not even considered in the majority opinion of the Court and was mentioned by Judge Clark in a concurring opinion and then only in passing. It was labeled improper —never erroneous.

This court knew nothing of the situation in Trumbull County until September 17, 1962, when it sat in Warren to hear this appeal. We were not even aware of the Sewer Project let alone any of the machinations of the individuals involved in this case. We did not know of the questioned speech until we read the clipping included in appellant's brief. It could have had no effect on the outcome of this cause. We feel that it is not misconduct on the part of the Prosecuting Attorney. The seventh assignment of error is not well taken.

This opinion is unduly long; however we must write a dispositive paragraph. It seems redundant to say that this entire situation is a sad commentary on city officials and contractors alike—at least some officials of one city and officers of at least two contracting firms. The officials

of the two construction companies were granted immunity under Revised Code Section 2917.04. Two of these men did not seem to be strangers to the type of operation carried on in Warren. They helped make this situation possible. We realize that sewage handling is a dirty business in and of itself. It is not necessary, however, for all things connected therewith to be permeated with the malodorous malevolence which surrounded this tortured town's try toward elutriation.

We conclude that the appellant had a fair trial, even though it was under very trying circumstances. The appellant's attorney was a skilled practitioner who protected his client's rights at all times. The judgment herein appealed from is affirmed.

Collier J., Concurs
Brown, J., Concurs

APPROVED:

WILLIAM D. RADCLIFF
Presiding Judge

Office-Supreme Court, U.S.
FILED
OCT 16 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 474

PAUL LAMONGE,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE STATE OF OHIO IN OPPOSITION.

LYNN B. GRIFFITH, JR.,
Prosecuting Attorney,
DAVID F. McLAIN,
Assistant Prosecutor,
Attorneys for Respondent.

Court House,
Warren, Ohio.

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I. Petitioner was not deprived of his rights under the 14th Amendment to the Constitution of the United States because such amendment does not even require Grand Jury proceedings as a prerequisite to a criminal conviction in state courts. Even if Grand Jury proceedings did come within the purview of the 14th Amendment, the record of this case is devoid of any evidence of irregularity in the selection of the Grand Jury. Finally the issue of alleged irregularity was not properly raised in accordance with the operative Ohio statutes 13

II. Defendant's right to a public trial was not violated by removing the trial to the home of a witness who had become suddenly ill and was unavailable for testimony at the Court House when the court announced to the parties and spectators that the trial would be adjourned to the home of the witness and issued no order excluding anyone from the trial. Such adjournment was a matter of necessity and within the discretion of the trial court. The right to trial by an impartial jury was not violated because the bedroom of the witness was too small to admit the entire jury since such was a matter of necessity and within the discretion of the trial judge and the basic rights of confrontation and cross examination were preserved 20

III. The Court did not err in permitting the Prosecuting Attorney to cross examine the defendant as to matters which might bear on the defendant's intent or which might have provided a basis for impeachment of the defendant. In any event no error can be predicated on such questions when the answers of the defendant thereto were entirely exculpatory 24

IV. There was no violation of the petitioner's rights under the Fourteenth Amendment by virtue of an amendment to the indictment for such amendment did not change the nature of the crime charged and is permitted by statute. It was not complained of by the petitioner at any time and no prejudice has been shown or even suggested. Further any alleged error in this regard has not been properly preserved for the reason that the same has not been properly raised at any stage of the proceedings in the state courts below 29

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OPINIONS BELOW.

There is no opinion of the trial court in this case, the opinion of the Court of Appeals for the Fourth Judicial District, sitting by special assignment in the Seventh Judicial District, and included in Petitioner's brief has been reported at 117 O. A. 143, 23 O. O. 2d 314.

JURISDICTION.

The jurisdiction of this Court is not properly invoked with respect to Point Four of the petition, for the reason that the question presented therein was not raised in the State courts.

STATEMENT OF FACTS.

A full understanding of this case necessitates a review of the history of the Warren Sewer Improvement Project, particularly what are known as Phases B and C. Phase B consists generally of the construction of a sewer to collect storm water and deposit it in the Mahoning River, thus diverting the same out of the Warren Sanitary Sewer System. Phase C involves the construction of a sewer generally following the path of the Mahoning River. The purpose of this line is to intercept existing sewer lines and collect the sewage presently dumped raw into the Mahoning River by such existing lines, and carry the sewage to a new sewage treatment plant. The cost of these phases of the project is in excess of Four Million Dollars.

The engineering firm of Havens and Emerson, Cleveland, Ohio, was employed by the City of Warren, to conduct the necessary surveys and to draw the plans and specifications and estimates for this project. In May, 1960, after the engineering survey had been completed, the City Council of Warren passed an ordinance authorizing the Safety Service Director to advertise for bids for Phases B and C of the sewer improvement project. The ordinance passed contained no authority for the Board of Control, *i.e.*, the Mayor and the Safety Service Director, to award a contract on the basis of the bids, nor did it contain any of the necessary fiscal authority to finance the project. It is to be noted that the City Council of Warren employed this tripartite legislative technique throughout the period in which the project was to be let. The authority for advertising for bids, the authority for awarding the contract, and the fiscal legislation were each handled by a separate ordinance. The net effect of this scheme was to give the Council control over the contract at three different levels.

First bids were received and opened on August 1, 1960, but subsequent thereto Council passed no ordinance authorizing the Board of Control to enter into a contract with the low bidders. Instead a second advertisement for bids was authorized. These bids were received on October 7, 1960. Again, Council failed to pass the necessary ordinance authorizing the Board of Control to award a contract. Bids were received for the third time on March 16, 1961, at which time the Rocco Ferrera Company and the Boam Company of Lavonia, Michigan, bidding together in a joint venture, were low bidders on Phase B of the project; and the Al Monzo Construction Co. of Monroeville, Pennsylvania, was low bidder on Phase C of the project. At this letting, contractors had been invited to submit both separate bids on each phase of the project and combined bids on both phases. The low bid on a combined bid for both phases had been submitted by the Boam-Ferrera Companies, and Havens and Emerson recommended to the City that it accept this combined bid as the lowest and best bid for both phases, even though total dollar cost of this combined bid was slightly in excess of the total of the Ferrera-Boam bid on Phase B and the Monzo bid on Phase C.

On May 5, 1961, the City Council passed an ordinance authorizing the Board of Control to enter into a contract with the Ferrera-Boam Companies on both phases of the project. On July 6, 1961, contract was signed between the City and the Ferrera-Boam Companies for the construction of Phases B and C.

With this broad outline of the legislative history and the project in mind, it is now necessary to return and trace the activities of Raymond Little and other members of the Warren City Council during the bidding of the project. Their activities provide the necessary background

for the entry of the defendant-appellant into the picture and his actions which form the basis for his conviction on the counts of threatening to kill Eugene Brady to extort money and obtaining money by false pretenses. In the summer of 1960, three members of the Warren City Council, Raymond Little, John Janosik and Jack Flask initiated a series of meetings with officials of the Ferrera-Boam Companies whom they knew to be interested in bidding on the Warren Sewer Improvement Project, as a joint venture. Officials of the Ferrera Company included its president, Rocco Ferrera, and Al Cicchini, Vice President and Secretary; officials of the Boam Company included Pat Brady and his son Eugene Brady, its Secretary and Treasurer. Negotiations on behalf of the Boam Company were carried on by Eugene Brady, and on behalf of the Ferrera Company by both Mr. Ferrera and Mr. Cicchini. From the outset, the three councilmen made it clear to the officials of the Boam and Ferrera Companies that they were interested, by various corrupt ways and means, in receiving illegal benefits from the Warren Sewer Improvement Project. Meetings took place in various cities and ways and means were discussed in general terms, whereby the councilmen could make money from the project. Possible techniques discussed included direct payments by the contractors upon the award of the contract; the eventual addition of nonexistent "extras," (a scheme to be consummated by the device of employing a resident engineer who would recommend certain changes in the basic contract involving the expenditure of additional money, and then certifying that such "extras" had been put into the job when in fact they had not); commissions on materials, etc.

By mid April, 1961, no specific agreements had been reached between the officials of the Boam-Ferrera Com-

panies as to the ways and means or amounts to be involved in the various forms of illegal payments to the councilmen. The situation in mid April was then as follows: From the point of view of the legislation, bids had been let for the third time, but the necessary second and third steps of authorizing the Board of Control to award the contract and providing financing had not been taken. The contract had, of course, not been signed. Negotiations as previously stated between the councilmen and the contractors had not yet resulted in any specific agreements. It is at this point that Frank Cickelli, Trumbull County Democrat Party Chairman, entered the picture. After a preliminary meeting between the officials of the Boam-Ferrera Companies and Mr. Cickelli in Cleveland in mid April arrangements were made for a meeting to be held on May 7, 1961. This meeting took place at the home of Frank Cickelli. The initial portion of the meeting was concerned with the negotiation of an exact figure to be paid by the contractors in return for their being awarded the contract. It was finally agreed that the sum of $35,-000.00 would be paid to both Cickelli and Little jointly. Following this there were further discussions at the meeting involving other ways and means for getting money into the hands of Cickelli and the councilmen. These conversations concerned the techniques to be used in putting fictional "extras" on the job.

It was also at this meeting that Cickelli first indicated that he would take care of contract matters as far as the Mayor of the City of Warren, Walter Pestrak, was concerned. This was a representation which both he and the defendant were to make on several other occasions.

Two weeks later another meeting was held in Warren between Brady, Cicchini and Cickelli at Cickelli's home. The primary purpose of this meeting was for the con-

tractors to meet the defendant, Paul Lamonge. The defendant was introduced by Cickelli as a trucker, and Cickelli requested that the contractors hire him on the job. After the defendant left, Cickelli pointed out to the contractors that Lamonge could be used in the scheme to effect the payoff. He suggested that with Lamonge doing the trucking, Lamonge could present false bills and be paid by the contractors for jobs not actually performed. The purpose of this plan was to get illegal monies to be paid to Cickelli and others out of the companies without a tax being paid thereon. Mr. Little also came to the Cickelli home during this meeting and inquired if the $35,000.00 agreement was still in effect, and was assured that it was.

Meanwhile City Council had passed the necessary legislation; the Board of Control had awarded the contract to the Boam-Ferrera Companies; and finally in July the City of Warren entered into a written contract with the Boam-Ferrera Companies for the construction of phases B and C of the Sewer Improvement Project. In the latter part of July, 1961, Al Cicchini who was to be field manager on the job, moved to Warren to set up his office and make preparations for the beginning of work. During the first couple of weeks in town he was frequently contacted by Cickelli. Cicchini and Cickelli had dinner and meetings together at which Mr. Cickelli again assured Cicchini that he represented the Mayor. At one of these meetings in the latter part of July, Cicchini asked Cickelli to have Paul Lamonge drop around the company office to discuss trucking. Lamonge appeared at the Boam-Ferrera Companies' office on the afternoon of August 2, 1961. At this time the defendant indicated to the contractors that he wished to have control of all subcontracting and material purchases, but the contractors stated that they had no such understanding of Lamonge's role in the project.

Defendant immediately placed a call to Frank Cickelli suggesting another meeting with Cicchini and Brady to straighten out the matter. This meeting was held at the Chateau Restaurant in Warren, and after dinner Cickelli advised the contractors that he had to make a speech in Vienna, Ohio. He requested the contractors drive him there so that they could discuss business on the way. On the way to Vienna the defendant insisted that Cickelli make clear to the contractors what his position was to be on the job. Finally Cickelli told the defendant that he was to work hand-in-hand with Cicchini, do everything for him and buy everything for him.

When they reached Vienna, the discussion turned to the $35,000.00 previously agreed upon at the May 7th meeting. The contractors mentioned having seen Mr. Little, and Cickelli advised them that Little was not to get any of the money and that instead the contractors were to pay the $35,000.00 to the defendant Paul Lamonge and nobody else. The contractors objected that this was not the original arrangement, but Cickelli reiterated that Lamonge was to get the money or else someone would get hurt.

Following this, work began on the job in earnest, but under the increasing pressure and control of the defendant, Paul Lamonge, who began to appear on the job daily, suggesting a series of schemes to get control over the purchase of material and the letting of subcontracts. He demanded to know of the contractors the prices of material bids from potential suppliers, so that before the contracts could be awarded for material or work, he could extract "contributions" from the subcontractors and suppliers.

Cickelli meanwhile continued to meet with Cicchini, with two matters of importance being discussed. The first of these was the arrangement for a down-payment on the

$35,000.00. It was agreed that the contractors would make a down-payment of $10,000 in cash. The second topic of discussion concerned the ways and means by which the balance of the money could be paid, the problem being the one which had existed from the beginning—of getting a large sum of money in and out of the companies without an undue tax burden. It was finally suggested at a meeting between Cickelli, Cicchini, Lamonge and Brady that a sales commission could be paid on the sale of material; the obvious source was the sale of the concrete pipe, as the job called for over one million dollars worth of this material. It was pointed out that an arrangement could be made to have a sales commission paid by the company supplying the pipe to a firm of Mr. Cickelli's choosing so that he could get the money. In accordance with this plan, Cickelli introduced Mr. Cicchini to an official of a company known as the M & W Sales Corporation and told Cicchini that the commission could be paid to them. The M & W Sales Corporation had nothing to do with the supplier, American Vitrified Pipe Company. Actually the contract had already been entered into sometime previously by Cicchini. However, this dummy arrangement was set up in order to enable the money to be paid to Cickelli in accordance with the agreement of May 7th. Through all these meetings in August Cickelli continued to indicate to Cicchini and Brady that he represented the Mayor. Meanwhile on his part the defendant also told the contractors that he and Cickelli would take care of matters as far as Mayor Walter Pestrak was concerned. Lamonge also requested of the contractors that he be introduced to Havens and Emerson's resident engineer, Howard Brown, for the purpose of getting a program of fictional "extras" started.

Though he had agreed, Cicchini was concerned by the

change in arrangement for the payment of the money originally scheduled to go to Little and Cickelli and now to be paid Lamonge. He therefore stalled the payment of any sum until the return from Europe of his company president, Rocco Ferrera. Upon Mr. Ferrera's return, a meeting was arranged between Cicchini, Ferrera and Cickelli. They met at Cickelli's house, and again Cickelli insisted that the money be paid to the defendant. In addition, there was a subsequent meeting at a local restaurant at which Cickelli again brought up the subject of subcontractors, saying that he wished to send subcontractors around and that if they would get contracts, contributions would be obtained from them in return for their getting the work.

Acting on the representations of Cickelli and the defendant that they represented Mayor Walter Pestrak, the contractors paid the sum of $5,000.00 to Paul Lamonge on August 22, at the field office of the Ferrera-Boam Construction Company, and on August 27th an additional $5,000.00 was given to the defendant in the Warner Hotel room of Cicchini.

To the contractors it now appeared that they had met $10,000.00 of their $35,000.00 obligation, and that the other $25,000.00 would be forthcoming from the sales commission to be paid to the M & W Company. The events of August 29th, however, showed that Cickelli and the defendant, Lamonge, had no intention of being satisfied with $35,000.00.

In order to explain the background of the events of August 29th, it must be remembered that at the third bid letting, Monzo Construction Company had been low bidder on Phase C. When the contract was awarded to Boam-Ferrera, Monzo Construction brought suit in order to force the City to set the contract aside, and award it the con-

tract for Phase C. As a result of this lawsuit, negotiations had been carried on between Al Monzo and Eugene Brady, with the view to subletting some of the work to Monzo as a means of settling the suit. Brady and Monzo discussed subletting approximately one million dollars worth of work on Phase C to Monzo, in return for which Monzo would drop his suit in Federal Court.

Having learned of these negotiations between Brady and Monzo, Lamonge came to the Ferrera offices in Warren on August 29th and demanded to know of Al Cicchini why he had not been informed of these subcontract negotiations claiming that he was to have control of the issuance and letting of all subcontracts, for the purpose of obtaining contributions from each and every subcontractor. Cicchini insisted that this was not the case and that the only thing that had been promised was that if Cickelli sent around subcontractors, they would be awarded the work, providing their bids were competitive. Lamonge continued to insist that he have control over all subcontracts, and heated arguments developed. After threatening Eugene Brady, Lamonge again suggested that Cickelli be contacted to confirm Lamonge's role on the job. Lamonge and the contractors went to the Cickelli home, but did not see Cickelli, and Lamonge showed a note to the contractors, stating it had been written by Cickelli. This note indicated that whatever Lamonge wanted should be done by the contractors. That evening the contractors refused to accept Lamonge's position that he control all the subcontracts. Lamonge and the contractors then parted company. The following noon Paul Lamonge came to the office of the Ferrera Company looking for Eugene Brady and brought with him four cars, which he stated were filled with his "boys" who were ready to take care of Gene Brady. Brady was not at the office, so Lamonge showed some of the cars with the men to Mike Ferrera, son of Rocco Ferrera, and

told the young boy it was lucky for Brady that he was not there.

When Cicchini and Brady returned from lunch, they received a report of this visit from Mike Ferrera, and almost simultaneously Lamonge returned to the office. He immediately made it clear that his intended purpose in coming to the office was to bring the contractors into line by threats of violence. He returned $5,000.00 to Brady and told him to get out of town within one hour or be killed. Turning to Cicchini, he advised him that he should also get out of town and his money would be returned later. In fear of their lives, the contractors made immediate preparations to leave Warren, which they did, and the project was shut down.

On September 18, 1961, the Trumbull County Grand Jury began its investigation into the stoppage of work on the Warren Sewer Improvement Project. Aware of the fact that the Grand Jury was investigating the work stoppage, Lamonge and Cickelli made a last ditch effort to save themselves. Fearing exposure of their illegal activities, they began to make a series of phone calls to Rocco Ferrera in an attempt to quiet the whole matter. Several phone calls were made by Lamonge, who attempted to convince Mr. Ferrera that he should return to work at once and that when Ferrera appeared before the Grand Jury, he should not reveal any of the illicit activities that had led to the work shutdown, but instead should attribute the work stoppage to "internal problems." On September 21st a phone call was made to Ferrera in Michigan. Cickelli talked with Mr. Ferrera and during the conversation asked Ferrera to forget everything that had been said, to reveal nothing of the payoffs or anything of Cickelli's or Lamonge's activities on the Sewer Project, and instead encouraged him to attribute the work stoppage to the fictional "internal problems."

The foregoing outline of facts was amply supported by the testimony of the prosecution witnesses and was only contradicted by the defendant who was a witness on his own behalf. In this testimony the defendant pictured himself simply as a trucker and a "public relations man" seeking to be helpful to all concerned. He characterized the events of August 29th and August 30th as a simple argument between himself and Gene Brady. Defendant acknowledged the receipt of $10,000.00 but claimed that $5,000.00 was a legitimate payment for his own services in protecting Al Cicchini from some vague dangers. As to the other $5,000.00, he claimed that this was paid to him by the contractors in an attempt to buy approval at City Hall for specification changes in the contract involving man-hole covers.

QUESTIONS PRESENTED.

(1) Was petitioner deprived of his rights under the 14th and 6th Amendments of the Constitution of the United States by any claimed irregularity in the selection of the grand jury when he failed to raise this issue in accordance with the applicable statutes and laws of the State of Ohio and when the record of this case is void of any evidence of alleged irregularity in the selection of the grand jury?

(2) Were petitioner's rights under the Fourteenth Amendment and 6th Amendment violated when the trial court removed the court and jury to the home of a witness for the State when the witness was shown to be unavailable for the trial because of illness and when the defendant was permitted to confront and cross examine such witness?

(3) Was the petitioner deprived of his rights under the 6th and 14th Amendments under the Constitution of the United States when the trial court permitted the

Prosecuting Attorney to cross examine the defendant on matters which might bear on his intent or provide a basis for impeachment of the defendant. And if such error was committed in this regard, was the error rendered harmless by the exculpatory answers of the defendant?

(4) Were the petitioner's rights under the 14th Amendment violated by an amendment to the indictment made in accordance with Ohio statutes and not changing the identity of the crime charged? Is petitioner entitled to raise this question in this court when the same has not been raised in the Ohio Courts?

ARGUMENT.

POINT I.

Petitioner was not deprived of his rights under the 14th Amendment to the Constitution of the United States because such amendment does not even require Grand Jury proceedings as a prerequisite to a criminal conviction in state courts. Even if Grand Jury proceedings did come within the purview of the 14th Amendment, the record of this case is devoid of any evidence of irregularity in the selection of the Grand Jury. Finally the issue of alleged irregularity was not properly raised in accordance with the operative Ohio statutes.

This Court has "consistently held that there is no federal constitutional impediment to dispensing entirely with the Grand Jury in State prescutions."[1] *Due process* of law as used in the 14th Amendment is concerned with the basic fairness of procedure on the trial of the ultimate

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[1] *Beck v. Washington*, 369 U. S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955; *Ocampo v. United States*, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712 (1914); *Lem Woon v. Oregon*, 229 U. S. 586, 57 L. ed. 1340, 33 S. Ct. 783 (1913).

issue of guilt or innocence in a criminal case and not with the particular accusatory method by which such issue is joined in State Courts.

Even if the 14th Amendment had application to the Grand Jury proceedings in a State case, the issues would still be that of basic fairness to the accused and not to the particular technicalities of procedure by the State in choosing a Grand Jury. It may be observed in this regard that the alleged irregularities as set out in the statutory sections cited in petitioner's brief pages 18, 19 and 20 are largely technical in nature and any possible violation of these statutes would not lead to impanelling of a grand jury which was either biased or which lacked the requisite qualifications to act as jurors. Nor is there even any claim by the defendant that such bias or lack of qualifications was present in this case.

Certainly any attempt to plead a violation of the 14th Amendment, in selection of a grand jury must be founded on some evidence of the irregularity of such selection. This evidence has never been submitted in this case. No evidence was presented in support of defendant's motion to dismiss the indictment for improper selection of the grand jury. There is nothing in the record to pass upon in this regard. Petitioner has attempted to incorporate by reference in his briefs in the Ohio Courts and in this Court matters raised in another case. Petitioner states on page 18 of his brief that a motion was sustained in the unreported case of *State of Ohio v. Little* to the array of the petit jury. There is no opinion delivered in this case and certainly no finding of a violation of all the statutes cited by the petitioner as seems to be implied in petitioner's brief. It is respectfully submitted that evidence of irregularities, if there were any, must appear in the record of this case if error is to be urged.

If this issue were not disposed of by the foregoing, the record of this case clearly shows that the petitioner did not comply with the laws of Ohio in the manner of raising objection to irregularities in the alleged impanelling of the grand jury.

Ohio Revised Code Section 2313.41 provides:

> "*A challenge of the array may be made* and the whole array set aside by the court *when the jury, grand or petit, was not selected*, drawn or summoned, or when the officer who executed the venire did not proceed *as prescribed by law*. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in his name; *but such challenge shall only be made before the jury is impaneled and sworn*, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer, if the jurors who formed the same possessed the requisite qualifications to act as jurors."

There is no question as to the qualifications of the grand jurors that indicted this defendant. No challenge to the array of this panel of grand jurors was made. The Ohio code is very specific in stating, "no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors."

Ohio Jurisprudence 2d discusses this matter in two places and states as follows:

15 O. J. 2d, 196:

> "The lack of legal qualifications of grand jurors may be taken advantage of by a plea in abatement. But mere irregularities in selecting and drawing grand jurors which do not relate to or affect their personal qualifi-

cations as such, must be taken advantage of, if at all, by challenge for cause, and not by a plea in abatement."

26 *O. J.* 2d 268:

"Technical defects and irregularities in the selecting, summoning and impaneling of a grand jury must, by express statutory provisions, be availed of, if at all, by challenge before the grand jury is impaneled and sworn."

A leading authority is the case of *State of Ohio v. Huling*, 17 O. S. 588, wherein the Court stated:

"Whether the latter kind of objection (objection to mere irregularities in the manner of selecting of grand jurors) can be taken by plea to the indictment, is a question upon which there has been much difference of opinion and contrariety of decision. Since the decision of the case of *Doyle v. the State*, 17 Ohio 222 it has been settled law in Ohio that such a plea is good in all cases where the objection is to the qualification or competency of the individual jurors. This is as far as we have gone. We have never had and such is not the practice so far as we know, that mere objections to the *manner* of selecting and constituting the jury can be taken by plea in abatement. On the contrary, the practice is to require the objection to be taken by challenge for cause, either to the panel or to individual jurors."

In the case of *The State of Ohio v. Blaney*, 17 O. C. C. 486 exception was taken to the indictment, first by a motion to quash and then by a plea in abatement which alleged defects and irregularities in selecting, drawing, summoning and impaneling the grand jury. The Court held:

"None of these things are of essence, and it is believed, unless they are, they cannot properly be made the basis of a motion to quash the indictment, or of a plea in abatement, but must, by express statutory provi-

sion, be availed of, if it all, by challenge before the jury is impaneled and sworn." (Sec. 5175 R. S. cited.)

A close reading of Section 5175 of the Revised Statutes discloses that it is with the exception of two or three minor words identical with Ohio Revised Code Section 2313.41. This rule was followed in the cases of *State v. Lindsey*, 4 O. C. C. N. S. 409, *State v. Dieter*, 81 O. S. 505, *State v. Lynch*, 5 O. S. 16 and *State v. Easter*, 30 O. S. 542.

In *State v. Roth*, 3 O. C. C. 59 on page 63 it is stated:

"In some of the States, challenge seems to be the only form in making the objection even where it goes to the personal disqualification of the jurors. The better opinion however is and the current of authority is to that effect that irregularities in selecting and impaneling grand juries which do not go to their incompetency can be only objected to by way of challenge but that their individual incompetency may be pleaded in abatement to the indictment."

This is, and has been the law of Ohio since 1848. The defendant in this case having failed to challenge the array as prescribed by statute and thereby obtain a new panel cannot now complain after conviction, of any alleged irregularities.

The second reason this assignment of error is not well taken is that even if alleged irregularities in the selection of the grand jury may be objected to other than by challenge to the array, it must be done by plea in abatement.

Ohio Revised Code Section 2941.55 provides:

"Plea in abatement may be made where there is a defect in the record shown by facts extrinsic thereto."

The rule is set out in 15 *O. J.* 2d 402 as follows:

"The lack of legal qualifications of grand juries may be taken advantage of by a plea in abatement."

It appears that if defendant had an alternate method available to him of objecting to these alleged irregularities, it is by plea in abatement.

Ohio Revised Code Section 2941.59 provides:

> "The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement by demurring to an indictment, or by pleading in bar or the general issue."

In *State of Ohio v. Detterline*, 15 O.N.P., N.S. 433, it was held:

> "A plea of abatement must be made prior to the plea of not guilty, and where it is discovered during the taking of testimony that the prosecuting witnesses has been incorrectly named in the indictment it is too late to interpose a plea of abatement."

In this case the defendant entered his plea of not guilty on October 17, 1961, with leave until October 20, 1961 to file motions. It was not until January 31, 1962 that his motion, which is difficult to define, was filed. Having entered his not guilty plea, defendant, by reason of O. R. C. 2941.59 waived any objection to the impanelling of the grand jury.

Though appellee believes the proper method for objecting to the grand jury was by challenge as provided by O. R. C. 2313.41 if there were any other method of questioning the alleged irregularities of the grand jury, it should have done by plea in abatement and this must be done before the entry of the not guilty plea.

Ohio Revised Code Section 2941.08 (k) would also cure any possible defects complained of in respect to the grand jury.

Ohio Revised Code Section 2941.08 (k) provides:

> "An indictment or information is not made invalid, and the trial, judgment or other proceedings stayed,

> arrested or affected; for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits * * *."

Defendant has not questioned the qualifications of the grand jurors, does not allege that any single member of the grand jury was biased, partial, or otherwise an unsuitable person for jury service. The soundness of their indictment would seem to be substantiated by the conviction of the petit jury.

It is not clear from petitioner's brief whether he is also attempting to raise an issue of the violation of the Fifth Amendment to the Constitution of the United States, but if such be the case it is clear "That the Fifth Amendment does not take upon itself the local law as to how the grand jury should be made and raise the latter to a constitutional requirement.[1]

The Due Process of Law Clause in the 14th Amendment has also been held to even permit prosecutions by prosecutors information and not even require the states to indict by grand jury. In the case of *Lem Woon vs. The State of Oregon*, 229 U. S., 586, 57 L. Ed. 1340, where the defendant was prosecuted by information as prescribed by Oregon Law the holding of the United States Supreme Court was:

> "The information laws do not contravene the fourteenth amendment and deny due process of law as required by the fifth amendment of the United States Constitution."

The case cited by the defendant (p. 22 of his brief) is the case of the *United States of America vs. Hoffa*, 196 F. Supp. 25 (1961). In that case the defendant was indicted by a Federal Grand Jury which was selected in violation

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[1] In the matter of *George Moran*, 3 U. S., 51 L. Ed. 105, see also 24 *Amer. Jurisprudence*, page 833.

of the Federal Civil Rights Act of 1957. The case was heard upon the motions of the defendant before trial was even had and apparently before plea was even entered. There is no indication that all procedures for raising the question were not properly complied with and in pursuance to the motions filed, evidence was submitted to the Court which clearly disclosed the irregularities. In the case at bar the statutory procedures for raising the objection to the grand jury were not followed nor was there any evidence submitted of any irregularities.

POINT II.

Defendant's right to a public trial was not violated by removing the trial to the home of a witness who had become suddenly ill and was unavailable for testimony at the Court House when the court announced to the parties and spectators that the trial would be adjourned to the home of the witness and issued no order excluding anyone from the trial. Such adjournment was a matter of necessity and within the discretion of the trial court. The right to trial by an impartial jury was not violated because the bedroom of the witness was too small to admit the entire jury since such was a matter of necessity and within the discretion of the trial judge and the basic rights of confrontation and cross-examination were preserved.

Petitioner was charged and convicted on the third count of the indictment against him of obtaining $10,000.00 by false pretenses, to-wit: that he had falsely stated that he represented Mayor Walter Pestrak of the City of Warren in negotiations with officials of the Boam-Ferrera Company. It therefore became incumbent upon the state to prove the falsity of this representation by the testimony of Mr. Pestrak who was the only one who could

positively deny that the defendant acted in any representative capacity for him. Mr. Pestrak was taken suddenly ill after the commencement of the trial. Both his personal physician and a court appointed physician certified to the trial judge that requiring the presence of Mr. Pestrak in the court would involve a serious danger to his health. Since the Ohio Statutes[1] provide that "depositions to be used as evidence upon trial must be filed at least one day before the day of trial," the only possible method of obtaining this testimony was by removing the place of trial to the home of the witness.

It was conceded by both sides in the courts below that there was no Ohio law directly in point on the question of the propriety of this procedure. However, by its decision in sustaining the conviction in this case, the Supreme Court of Ohio has chosen to adopt the majority rule as set forth in 43 *A. L. R.* 1535:

> "In the majority of cases, and by what seems the better rule (unless prohibited by statute), it is held that the trial court may in its discretion adjourn court to the home or residence of a sick witness who, because of his illness, is unable to attend it at the court house, and there take his testimony; and that the validity of the proceedings is not affected thereby, provided there is no abuse of discretion, the parties are not put to substantial inconvenience, their rights prejudiced, etc."

There is of course no federal constitutional inhibition to Ohio adopting this procedure. The question then becomes whether under the circumstances there was any violation of due process of law under the 14th Amendment in the manner in which the trial was conducted at the home of the witness Walter Pestrak.

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[1] O. R. C. 2319.26.

The first contention of the petitioner in this regard is that the witness testified outside the presence of the jury. It may be conceded that because of the limitations of space, the jury was not in the same room as the witness and did not have the opportunity to observe him while he testified. Appellee does not agree however as stated in petitioner's argument that the jury was outside the hearing of the witness. Since the record does not indicate that the jury could not hear the testimony it must be presumed that the trial judge did not permit any meaningless charade of eliciting testimony from a witness who could not be heard by the tryers of fact. If indeed the jury could not hear the witness, one might wonder why counsel for the defendant indulged in such a lengthy cross examination.

It is respectfully submitted that the right of the defendant to have the jury observe witnesses while not to be dispensed with without cause is not an unqualified one. The most obvious analogy is that of the use of depositions in criminal cases which are permitted by State laws and held by this Court not to be a violation of the 14th Amendment.[1]

It is clear that the two primary rights afforded the defendant in a criminal case with respect to witnesses, i.e., confrontation and cross examination were both preserved to him. The defendant was in the room with the witness and defendant's counsel was permitted to and did cross examine the witness at great length.

Petitioner's second contention with respect to a violation of due process in the taking of Mr. Pestrak's testimony is concerned with an alleged exclusion of the public from this portion of this trial. Appellee does not agree with the statement contained in petitioner's brief that

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[1] *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 S. Ct. 650; *Harrison v. State*, 270 U. S. 632, 70 L. ed. 771, 46 S. Ct. 350.

there was any announcement that the general public would be excluded and finds no such announcement in the record of this case. In fact the record shows that the court announced the adjournment to the home of the witness in open court and while expressing doubt as to the number of members of the public who could be admitted because of space limitations implied that subject to such limitations the public would be admitted. The record contains no evidence or claim by counsel that anyone wishing to enter the home was in fact excluded and as a matter of fact members of the press were present. It might be conceded that the lack of space in the Pestrak home once the parties, counsel, jury, court and reporter had been admitted would place a limitation on the number of persons of the general public who could gain a vantage point for observing this particular part of the trial. While it may be conceded that the accused's right to a public trial would prohibit arbitrary exclusions of the entire general public from all portions of the trial, it has been recognized in many instances that particular circumstances would justify a trial judge in excluding some segments of the public for parts of the trial, for example, exclusion of spectators creating a disturbance, exclusion of such spectators whose presence would overcrowd the courtroom, exclusion of the public where the presence of spectators is necessary to prevent the embarassment or emotional disturbance of a witness particularly of one of immature years.[1] The common thread in the cases upholding the right to exclude portions of the public seems to be a showing of the necessity for such exclusion under the circumstances, plus the preservation of the overall public character of the trial by the admission of the public to

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[1] 48 ALR 2d, 1425 and annotations thereunder.

such parts of the trial as did not involve the reasons for partial exclusion.

In the instant case the only exclusion of the general public was caused by the medical necessity of taking testimony from a witness in a small home. Examination of the record shows that this testimony did not comprise any major part of the trial and that the generally public nature of the trial was preserved.

POINT III.

The Court did not err in permitting the Prosecuting Attorney to cross examine the defendant as to matters which might bear on the defendant's intent or which might have provided a basis for impeachment of the defendant. In any event no error can be predicated on such questions when the answers of the defendant thereto were entirely exculpatory.

The evidence submitted by the Court and complained of by the petitioner as a violation of his rights under the Fourteenth Amendment can be divided in three categories:

1. Evidence of the defendant's occupation.
2. Evidence of the defendant's conviction of violation of State and Federal law.
3. Questions relating to the possible involvement of the defendant in an incident of violence directed towards the Police Chief of Niles, Ohio.

With respect to the first category of evidence the defendant admitted that he was a gambler on a commercial basis and that he had a professional gambling game and he denied having the occupation of body guard. The defendant himself had testified on direct examination as to his various occupations including being a painting contractor and a partner in the trucking business with Willie

Mazza. Having opened the door on these matters defendant cannot be now heard to complain that the State made inquiry into his other occupations. The defendant wished to have the jury know his different lines of work and if some of these were properly before the jury then surely the other occupations were also proper subjects for cross examination. So far as being a body guard appellee knows of nothing illegal or blameworthy in this occupation.

As to the conviction for violation of Federal Rationing Laws, and conviction of shooting with intent to wound appellee believes that the law of this State permitting impeachment of any witness including the defendant by showing of his conviction of crime is too well settled to admit of citation or argument.

The final area of questioning cited by petitioner is that of the inquiry on cross examination into the possible involvement of the defendant in placing dynamite at the home of Police Chief Ross of Niles, Ohio.

It is well to remember that the defendant was charged with two counts of threatening to kill with intent to extort. Specific intent was therefore an element of two counts of the indictment. Indeed intent was more than a technical element. Under the evidence it might be regarded as the crux of the case since to a large extent the defendant agreed with the skeleton of facts surrounding the threats directed at Brady and Cicchini. The defendant admitted being at the Boam-Ferrera offices on the day of the alleged threats and admitted telling Brady he was "x." (R. 497). (Though he denied that this was a threat to kill and passed the matter off as a personal argument.)

Intent being a key issue in the case, the State was entitled by statute to prove any acts of the defendant which would tend to show his motive or intent, the absence of mistake or accident on his part or a scheme, plan or system

in doing an act. (O. R. C. 2945.59). This, of course, could be done by cross examination if possible.

Had the defendant admitted being involved in the bombing of a public official's home and had the motive been extortion or similar pressure as it usually is when acts of violence are directed against public officials then the evidence would have been competent for the purposes set forth in R. C. 2945.59.

It goes without saying that cross examination is often an exploratory process in which the questioner hopes to elicit matter which will be material and helpful to his cause. Every trial lawyer, however, has had occasion to discover to his sorrow that this goal is frequently frustrated by the answers of a hostile witness. Any extensive cross examination will be found to contain questions and answers which become "immaterial" by the negative answers of the witness. The extent to which such exploratory cross examination is permissible is a matter within the discretion of the trial judge. In the present case, as it happened, the defendant denied any voluntary or conscious participation in the bombing and in accordance with the usual rules the State was bound by his answers and the matter went no further. There was nothing inflammatory in the manner of questioning nor any indication that the counsel for the State entertained any particular belief with respect to the guilt or innocence of the defendant. The evidence then which went to the jury on this matter was wholly exculpatory. In fact defense counsel seized the opportunity presented by these questions to place before the jury the ordinary inadmissible results of a lie detector test and an apology from the victim, Chief Ross, for even questioning defendant on the bombing matter. (R. 542.) While on the subject of lie detectors counsel also elicited from the defendant a statement that he volunteered to take a

lie detector test on the Sewer Project matter and had been refused. It is difficult to see then how the defendant could have been prejudiced by these questions and answers.

In the case of *State v. Witsel*, 144 O. S. 190, the conviction was upheld although the prosecutor on cross examination had questioned the defendant as to his participation in other crimes. The defendant denied participation in these other crimes. Finding no error prejudicial to the defendant, the court said:

> "It will be noted that in the *Wagner* case the defendant had been obliged to discredit himself before the jury by admitting that he had been indicted for certain crimes, whereas in the instant case the defendant denied the imputations contained in the questions of counsel for the State, and, so far as the record goes, there is no evidence in support of those matters reflecting upon the character or conduct of the defendant. The question before this Court is whether the conduct of counsel for the State in putting these questions to the defendant was so prejudicial as to require a reversal of the judgment."

The Court then went on to cite the provision of G. C. Section 13449-5 now R. C. 2945.83[1] in finding that the asking of the questions did not in and of itself require reversal.

It may also be noted in this case that the questions asked could have formed the foundation for impeachment of the witness by F. B. I. agents that the defendant lied about his answers to questions posed by such Federal agents.

Finally the Supreme Court of the United States had occasion to consider this matter on similar facts in the

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[1] G. C. Sec. 13449-5 now R. C. 2945.83: Requiring affirmative proof in the proof in the Record that the accused was or may have been prejudiced thereby. See Appendix.

case of *Robert Sawyer v. U. S.*, 202 U. S., 150, 50 L. ed. 972. In this case the defendants had been convicted of a mutinous murder on the high seas. On cross examination by the District Attorney of one of the defendants who had voluntarily become a witness in his own behalf, questions were asked as to the conduct of the defendant-witness on a previous occasion on a different vessel in regard to which nothing had been said on examination of the witness in chief. The Court found the innocent answers of the defendant conclusive on the question of whether or not there had been any prejudice from this line of interrogation stating:

> "It is unnecessary in this case to inquire whether the cross examination was within the prescribed limits because the witness denied that he had any trouble or that he had ever tried to create any trouble, or that there was any insubordination on his part onboard the vessel, named. What he said in regard to the facts show that there was neither trouble or insubordination. The Government made no attempt to contradict the evidence on this subject and hence there could be no harm arising from the cross examination. There are some State authorities which hold that the error, if any, is not cleared by answer of the witness denying the charge, but we think the better rule is whereas, in this case, it is plain that there is no injury, the exception is not available."

POINT IV.

There was no violation of the petitioner's rights under the Fourteenth Amendment by virtue of an amendment to the indictment for such amendment did not change the nature of the crime charged and is permitted by statute. It was not complained of by the petitioner at any time and no prejudice has been shown or even suggested. Further any alleged error in this regard has not been properly preserved for the reason that the same has not been properly raised at any stage of the proceedings in the state courts below.

Subsequent to the arraignment of the defendant and prior to trial, the trial court permitted the State to amend the indictment with respect to Count three by adding words which stated that the crime upon which the defendant had been indicted by the Grand Jury, to wit: obtaining money by false pretenses, had been done in conspiracy with one Frank Cickelli. Such amendment is permitted in Ohio by statute.[1] It may be noted that this statute permits the amendment of the indictment even after the trial so that there is obviously no resubmission to the Grand Jury contemplated when an indictment is amended.

It must be emphasized that this amendment did not in any way change the identity of the crime charged. It remained the same both before and after indictment, i.e., obtaining money by false pretenses. Though the State intended to and did prove a conspiracy for the purpose of introducing the statements and acts of Cickelli, as a co-conspirator of the defendant in the obtaining of the money by false pretenses, the State's right to do so was not founded upon the change of indictment, but rather upon the general rules of evidence which, upon a theory of

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[1] O. R. C. Section 2941.30

mutual agency, permit the introduction of the acts and declarations of the co-conspirator in furtherance of the object or design of such conspiracy. Words added were therefore in no way essential either to the charging of the crime or the presentment of the state's case. Far from being prejudicial to the defendant, the amendment acted as a further specification of the crime and put the defendant on notice that a part of the state's case would be presented by means of the introduction of the acts and declarations of a co-conspirator.

The defendant at no time, by motion or otherwise, objected to the amendment, asked that the words be stricken or make any complaint whatsoever with regard to this proceeding.

Finally, the claim of error in amending the indictment without resubmission to the grand jury was not raised at any time during the proceedings in the State courts.[1]

Appellee has already set forth in his brief under Point I its contention with supporting legal authorities to the effect that the Fifth Amendment to the Constitution does not apply to the States and that there is no constitutional inhibition against proceeding to the trial of a criminal cause in a State court without the intervention of any grand jury at all. This contention applies with equal strength and validity to Point IV of the petitioner. Petitioner can not even suggest any manner in which he was prejudiced by the addition of words which did not change the identity of crime and merely acted as a sort of bill of particulars for his benefit.

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[1] Appendix, Appellant's Assignment of Errors in the Supreme Court of Ohio.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied for the reason that it presents no substantial question involving a denial of petitioner's federal constitutional rights.

Respectfully submitted,

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APPENDIX.

STATUTES.

O. R. C. Sect. 2313.41—POINT I.—Array may be set aside.

A challenge to the array may be made and the whole array set aside by the court when the jury, grand or petit, was not selected, drawn, or summoned, or when the officer who executed the venire did not proceed as prescribed by law. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in his name; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.

R. S. 5175—POINT I.—Array may be set aside.

A challenge to the array may be made and the whole array set aside by the court, when the jury, grand or petit, was not selected, drawn or summoned, or when the officer who executed the venire did not proceed as prescribed by law. But no challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror or jurors; but on challenge, a juror or jurors may be set aside by reason of a misnomer in his or their names; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.

O. R. C. 2941.55—Point I.—Plea in abatement.

Plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto.

O. R. C. 2941.59—Point I.—Waiver of defects.

The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment, or by pleading in bar or the general issue.

O. R. C. 2941.08 (k)—Point I.—Certain defects do not render indictment invalid

(k) For other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits.

O. R. C. 2319.26—Point II.—Deposition to be filed.

Every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial.

O. R. C. 2945.49—Point III.—Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

O. R. C. 2945.83—Point III.—When new trial shall not be granted.

No motion for a new trial shall be granted or verdict set aside; nor shall any judgment of conviction be reversed in any court because of:

(A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;

(B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial.

O. R. C. 2941.30—Point IV.—Amending an indictment.

The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment of information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reason-

able continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance of postponement under this section is reviewable except that motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

APPELLANT'S ASSIGNMENT OF ERRORS IN THE SUPREME COURT OF OHIO.

1. Defendant-Appellant was deprived of his rights under Article I, Section 5 of the Constitution of the State of Ohio and the Sixth Amendment of the Constitution of the United States of America for the reason that the panel of jurors drawn to serve as grand jurors was not selected according to law.

2. The verdict and judgment of the jury was not substantiated by sufficient evidence and was contrary to the weight of the evidence.

3. The trial court erred in permitting the introduction by the State of evidence of conversations between witnesses and third parties at which Defendant-Appellant was not present, with no proper foundation laid or proof of conspiracy.

4. The trial court erred in sustaining the motion of the prosecution in moving the court and jury to the home of the State witness, Walter Pestrak, and ordering the court, jury and defendant to said home, over the objection of the Defendant-Appellant.

5. The trial court erred in permitting the Prosecuting Attorney, over the objection of the Defendant-Appellant, to cross-examine the Defendant-Appellant as to matters completely collateral and not associated in any way with the crimes charged in the amended indictment.

6. The trial court erred in its charge to the jury.

7. Misconduct of the Prosecuting Attorney regarding his comments of the case, while appeal was pending.

8. The Court of Appeals erred in affirming the judgment and sentence of the trial court.